88-1329

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

In Re

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES and MARTA R. TORRES,

Petitioners.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, AND THE HONORABLE JAMES KEHOE, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

1. Is there a clear and indisputable right to adjudication by a three-judge district court of a claim brought under section 203 of the Voting Rights Act?

2. Does the refusal of a single district judge to convene a required three-judge court and his denial on the merits of a claim required to be heard by a three-judge court preclude a United States Court of Appeals from affirming the decision of the district court on the merits?

PARTIES TO THE PROCEEDING BELOW

Pedro Delgado

Elia Gregorio

Marcelo Llanes

Marta R. Torres

Jim Smith, in his official capacity as Secretary of State of the State of Florida

David Leahy, in his official capacity as the Supervisor of Elections of Dade County, Florida, and as a representative of a defendant class of all County Supervisors of Elections in the State of Florida

Florida English Campaign

U.S. English Legislative Task Force, Inc.

U.S. English Foundation, Inc.

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Other Authorities

In California, They're Voting on Nearly Everything, BusinessWeek, Oct. 31, 1988, at 30 22

Just Say 'No' - Or 'Yes', Newsweek, Nov. 7, 1988, at 63 22

Review and Preview, Barron's, Nov. 7, 1988, at 5, col. 3 22

Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 Yale L.J. 1418 (1988) 22

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12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶ 421.03[7] (2d ed. 1980) 20

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 20

17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4040 (2d ed. 1988) 16, 20

13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3522 (2d ed. 1984) 19

THE OPINIONS IN THE COURTS BELOW

The opinion rendered by the United States Court of Appeals for the Eleventh Circuit is *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988). The opinion affirms *Delgado v. Smith*, No. 88-1880-CIV-JWK (S.D. Fla. Oct. 24, 1988).

Both opinions are printed in the separately bound appendix accompanying this petition. References to materials contained in the appendix are made by the notation "(A)." The opinion of the court of appeals appears at A1, and the opinion of the district court appears at A35.

JURISDICTION

(i) *Date and Time of Judgment Below.* The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 4, 1988. (A43). The judgment of the court of appeals affirms the judgment of the United States District Court, Southern District of Florida, entered on October 24, 1988. (A42). By order entered on October 18, 1988, the district court denied the petitioners' application for a three-judge panel. (A31).

(ii) *Denial of Rehearing.* The court of appeals denied rehearing on December 19, 1988. (A45).

(iii) *Statutory Basis for Jurisdiction.* The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1651 (West 1966) and the authority of this Court's decisions in *Stratton v. St. Louis Southwestern Railway Co.*, 282 U.S. 10 (1930) and *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962).

STATUTES AT ISSUE

Section 4(f)(4), Voting Rights Act, 42 U.S.C.A. § 1973b(f)(4):

> Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Section 203(c), Voting Rights Act, 42 U.S.C.A. § 1973aa-1a(c):

> Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Section 204, Voting Rights Act, 42 U.S.C.A. § 1973 aa-2:

> Whenever the Attorney General has reason to believe that a State or political subdivision (a) has enacted or is seeking to administer any test or device as a prerequisite to voting in violation of the prohibition contained in section 1973aa of this title, or (b) undertakes to deny the right to vote in any election in violation of section 1973aa-1 or 1973aa-1a of this title, he may institute for the United States, or in the name of the United States, an action in a district court of the United States, in accordance with sections 1391 through 1393 of Title 28, for a restraining order, a preliminary or permanent injunction, or such other order as he deems appropriate. An action under this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall be to the Supreme Court.

STATEMENT OF THE CASE

This petition for writ of mandamus arises in a case involving an initiative to amend the Florida constitution to declare English the state's official language.[1] At issue in the underlying action is whether, in view of the language minority provisions of the Voting Rights Act of 1965, 42 U.S.C.A. §§ 1971-1973bb-1 (West 1981 & Supp.

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1. Simultaneous with the filing of this petition for writ of mandamus, the petitioners filed a petition for writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit in the case giving rise to this petition. The reasons that both mandamus and certiorari have been sought and should be issued are discussed in the argument *infra*.

1988) ("Voting Rights Act" or "Act"), it was permissible to conduct this initiative (the "Official English Initiative") using a petition written only in English. At issue in this petition for writ of mandamus is whether a United States Court of Appeals has jurisdiction to affirm a single district judge's denial on the merits of a claim that is required to be heard by a three-judge court.

Florida citizens who desire to amend their state constitution may initiate and circulate a petition in support of the proposed amendment. If enough valid signatures are collected, and if they meet requirements of geographic distribution, the amendment may be placed on the ballot and put to Florida's electors for their consideration. Fla. Const. art. XI, § 3.

The Florida Election Code, Fla. Stat., Chapters 97-106 (1987), and the Florida Administrative Code, Fla. Admin. Code Chapter 1C-7 (1988), prescribe in detail the manner in which a petition initiative must be conducted. These provisions delineate the form that a petition must take, and require that the petition be approved by the Florida Secretary of State before it is circulated. They also specify procedures and standards for submission of signed petitions to the Secretary for certification and ballot positioning.

In accordance with these statutes and rules, the proponents of the Official English Initiative in 1984 obtained the approval of the Secretary of State to circulate a petition on the Initiative. The petition approved by the Secretary was written exclusively in English. In August, 1988, the Secretary certified that the sponsors had collected enough valid signatures for the measure to be placed on the ballot.

Of the 366,555 signatures that the Secretary certified as valid, 63,558 were obtained from electors in six Florida counties that are covered by the language minority provisions of the Voting Rights Act. In such counties, whenever the state provides any materials related to the electoral process, it must provide them in the language of the applicable minority group—here, Spanish. Section 4(f)(4), Voting Rights Act, 42 U.S.C.A. § 1973b(f)(4) (West 1981 & Supp. 1988); Section 203(c), Voting Rights Act, 42 U.S.C.A. § 1973aa-1a(c) (West 1981 & Supp. 1988).[2]

The petitioners filed a pre-election complaint on October 11, 1988, seeking declaratory and emergency injunctive relief. The complaint alleged that two sections of the Voting Rights Act—sections 203 and 4(f)(4)—had been violated because the Official English petitions improperly had been provided only in English in the six Florida counties covered by the language minority provisions of the Act. The complaint further alleged that the Official English Initiative should not have been certified to be put on the ballot for a vote in the upcoming election because the signatures on the improper petitions should not have been counted. Without those signatures, the Initiative would not be supported by the 342,939 signatures required by state law to place the measure on

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2. Both sections 203 and 4(f)(4) mandate that, whenever a state provides "materials or information relating to the electoral process," it must provide them in the language of the applicable minority group as well as in English. Five of the six Florida counties covered by the language minority provisions of the Act are covered by section 4(f)(4). One of the counties covered under section 4(f)(4) is also covered under section 203. The sixth covered county (Dade County), is covered only by section 203. *See* 53 Fed. Reg. 735, 736 (1988) (identifying Florida's six bilingual counties and designating their coverage under section 203 or 4(f)(4)).

the general election ballot.[3] Simultaneously with the filing of the complaint, the petitioners moved for a preliminary injunction against any votes being cast or counted with respect to the amendment in the upcoming November election.

Because claims under section 203 of the Act are required to be heard by a three-judge district court (with a direct appeal to the Supreme Court), the petitioners applied, pursuant to 28 U.S.C.A. § 2284 (West 1978 & Supp. 1988) and section 204 of the Voting Rights Act, 42 U.S.C.A. § 1973aa-2 (West 1981), for hearing of the cause by a three-judge court. (A47, 50). District Judge James Kehoe denied the application, finding that those statutes did not require a three-judge court in this instance. (A31).

The parties agreed to consolidate the adjudication of the petitioners' requests for preliminary and permanent relief and, after a one-day non-jury trial, Judge Kehoe, on October 24, 1988, rendered a judgment denying the requested relief and dismissing the complaint on the merits. (A42; *see also* A35-41). Petitioners filed a notice of appeal from the judgment to the United States Court of Appeals for the Eleventh Circuit on October 25, 1988, seeking to invoke that court's jurisdiction to review the final judgment of the United States District Court pursuant to 28 U.S.C.A. § 1291 (West 1966 & Supp. 1988) and 28 U.S.C.A. § 1294(1) (West 1966 & Supp. 1988). On October 27, 1988, the court of appeals granted the petitioners' request for expedited disposition in light of

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3. If *either* the signatures collected in counties covered under section 4(f)(4) or the signatures collected in counties subject to section 203 were discounted, the initiative would fail to satisfy the requirements for placement on the ballot.

the impending election and entered an order expediting the appeal, requiring that petitioners file their brief within four days (by October 31, 1988).

The petitioners' brief to the court of appeals pointed out on page 3 in footnote 2 that, upon filing the complaint in the district court, they had "applied, pursuant to 28 U.S.C.A. § 2284 (West 1978 & Supp. 1988) and section 204 of the Voting Rights Act, 42 U.S.C.A. § 1973 aa-2 (West 1981), for hearing of the cause by a three-judge court." The brief further stated explicitly that in rejecting this request, the district court "committed error."[4] The expedited nature of the appeal prevented the petitioners from providing the court of appeals with a fuller discussion of the jurisdictional consequences of Judge Kehoe's refusal to convene a three-judge court.

On November 2, 1988, however, the United States Department of Justice, as amicus curiae, filed a brief in support of the petitioners' position. The Justice De-

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4. The thrust of the petitioners' brief, however, was that the court of appeals should accept jurisdiction over the appeal and reverse the district court's disposition of the merits. As will be shown in the argument below, the petitioners' attempt to invoke the appellate jurisdiction of the court of appeals was not inconsistent with the position here that the Eleventh Circuit was without jurisdiction to affirm the district court's decision. The appeal was necessitated by a lack of clarity regarding the proper appellate remedy when a single district judge denies relief on the merits of a claim which must be heard by a three-judge court. *See generally Ex parte Cogdell*, 342 U.S. 163 (1951). If a three-judge court were not required to hear any of the petitioners' claims, as the trial court concluded, then the only appellate review available to the plaintiffs would have been by appeal to the court of appeals and petition for certiorari to this Court. In order to ensure that some appellate review of the district court's disposition of the case would be available, the petitioners had no alternative but to file the appeal and fully brief the merits to protect themselves against the possibility that their request for a three-judge court would be finally adjudicated against them.

partment's brief, in addition to arguing that the petitioners were entitled to relief on the merits, thoroughly discussed the three-judge court issue, tracing the legislative history of the Voting Rights Act and explaining why a single judge lacked jurisdiction to adjudicate the petitioners' section 203 claim.

On November 3, 1988, a panel of the court of appeals heard argument on the appeal. The following day, the divided panel rendered its decision, affirming the judgment of the district court, with one judge dissenting. (A1). Neither the majority opinion nor the dissent addressed the jurisdictional problem created by Judge Kehoe's decision to adjudicate a claim that could be heard only by three judges. The petitioners' suggestion for rehearing in banc was denied on December 19, 1988. (A45).

REASONS FOR GRANTING THE WRIT

This Court has held that, in the circumstances of the instant case—that is, where a single district judge has erroneously refused to convene a three-judge court and has denied on the merits a claim required to be heard by a three-judge court—a writ of mandamus lies to correct the error. *Stratton v. St. Louis Southwestern Railway Co.*, 282 U.S. 10 (1930).

The Court should issue the requested writ of mandamus, vacating the judgments of the lower courts and remanding to the district court with directions to convene a three-judge court to hear all of the petitioners' claims, because "exceptional circumstances warranting the exercise of the Court's discretionary powers" exist. *See* Sup. Ct. R. 26; *see also Allied Chemical Corp. v.*

Daiflon, Inc., 449 U.S. 33, 35 (1980); *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967); *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Moreover, the petitioners "have no other adequate means to attain the relief [they] desire[ ]" and their "'right to issuance of the writ is "clear and indisputable."'" *Allied Chemical*, 449 U.S. at 35 (citations omitted); *Kerr*, 426 U.S. at 403 (citations omitted).

I.

The Petitioners Have a Clear and Indisputable Right to Have a Three-Judge Court Adjudicate Their Claim

In the complaint, the petitioners alleged that the actions of the respondents abridged both sections 203 and 4(f)(4) of the Voting Rights Act. Congress has determined that claims advanced under section 203 must be heard by a three-judge court and an appeal from such a court's judgment must be to this Court. Section 204 of the Act expressly provides that claims brought under section 203 "shall be heard and determined by a court of three judges . . . and any appeal shall be to the Supreme Court." 42 U.S.C.A. § 1973aa-2 (West 1981).

Although section 204 provides for enforcement of section 203(c) only by the Attorney General, the legislative history of section 203(c) clearly indicates that Congress intended also to allow private parties, such as the petitioners in this case, to enforce section 203(c). Six years before the enactment of the language minority provisions in 1975, this Court had held in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), that Congress

intended to create a private right of action to enforce section 5 of the Act, 42 U.S.C.A. § 1973c, despite its failure expressly to authorize private enforcement. 393 U.S. at 554-57. In enacting section 203 and amending section 4 in 1975, Congress affirmed the existence of private enforcement actions, specifically citing *Allen*:

> Title III [containing section 203] authorizes the Attorney General to bring suit against any state or political subdivision which fails or refuses to comply with its prohibitions. Of course, private persons who are injured by the failure or refusal of a state or political subdivision to comply would also have the right to bring suit. *Allen v. State Board of Elections*. . . .

H.R. Rep. No. 196, 94th Cong., 1st Sess. 32 (1975); *see also* S. Rep. No. 295, 94th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 806-07 & n.40 (referring to the importance of private actions and specifically actions to enforce the rights of Spanish-speaking voters). Accordingly, Congress's clear intention was to permit private enforcement actions to complement federal enforcement of section 203.

This Court has determined that an implied private right of action based on an express right of action for the Attorney General that must be heard by a three-judge court, also must be heard by a three-judge court. *See Allen*, 393 U.S. at 560-63. At issue in *Allen* was section 5 of the Act, which requires covered jurisdictions to preclear changes in voting procedures by obtaining from a three-judge district court in the District of Columbia a declaratory judgment that the change does not have a racially discriminatory purpose or effect.

See 42 U.S.C.A. § 1973c (West 1981).[5] The provision states that any action thereunder—a preclearance action —must be heard by a three-judge court. *Id.*

The *Allen* Court implied a private right of action to enjoin covered jurisdictions from implementing voting changes that have not been precleared, and concluded that such an action must also be heard by a three-judge court. 393 U.S. at 554-63. The Court held that Congress had required three-judge court review in section 5 to provide additional protection to states whose electoral procedures were being significantly disrupted by the preclearance process. *Id.* at 562-63. The Court further held that a private action, filed to require a jurisdiction to submit a voting change for a preclearance determination, sufficiently disrupted state electoral procedures to infer that Congress would have wanted such actions heard by three-judge courts. *Id.* As the Court reasoned, "[a]lthough a suit brought by the individual citizen may not involve the same federal-state confrontation, the potential for disruption of state election procedures remains." *Id.* at 563. Accordingly, the Court mandated the empanelment of a three-judge court to hear private citizens' claims brought under section 5 of the Voting Rights Act.

The same reasoning compels the conclusion that a private action under section 203 of the Act must, like an action brought by the Attorney General pursuant to that section, be heard by a three-judge district court

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5. As the *Allen* Court recognized, Congress provided an express right of action under section 5 for both the Attorney General and covered jurisdictions. *See Allen*, 393 U.S. at 554-61; *see also* 42 U.S.C.A. § 1973c (West 1981); 42 U.S.C.A. § 1973j(d) (West 1981).

with a direct appeal to this Court.[6] In the instant case, however, the courts below failed to heed the congressional dictate that three-judge court review be afforded for all claims brought under section 203. The single district judge declined to convene the required three-judge court and denied both the section 4(f)(4) and section 203(c) claims on the merits.[7] The Eleventh Circuit, ignoring the jurisdictional problem posed by the district judge's refusal to convene the three-judge court and his denial on the merits of the claims, affirmed the decision of the district court. Under these circumstances, the petitioners' right to the issuance of the writ of mandamus is "clear and indisputable." *See Allied Chemical*, 449 U.S. at 35; *Kerr*, 426 U.S. at 402.

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6. The petitioners' inclusion in the complaint of a claim under section 4(f)(4) of the Act—which ostensibly need not be heard by a three-judge court—did not dispense with the need for a three-judge court. *See Zemel v. Rusk*, 381 U.S. 1, 5-6 (1965).

Moreover, a three-judge district court unquestionably could decide both of the claims advanced by the petitioners. Pendent one-judge claims that arise from a common nucleus of operative fact as a three-judge claim properly are within the jurisdiction of a three-judge court. *See City of Rome v. United States*, 472 F. Supp. 221, 236 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980) (finding jurisdiction to decide constitutional claims that did not have an independent three-judge jurisdictional base and section 5 Voting Rights Act claim); *see also Clayton v. North Carolina State Bd. of Elections*, 317 F. Supp. 915, 919-20 (E.D.N.C. 1970) (holding that "[h]aving jurisdiction as a three-judge court of at least part of the controversy, we conclude that we may exercise jurisdiction over the remainder of the controversy under the doctrine of pendent jurisdiction"); *cf. Alexander v. Fioto*, 430 U.S. 634, 636 (1977) (reviewing three-judge district court decision that could be read as resting on grounds that were not required to be heard by a three-judge court); *Brotherhood of Locomotive Engineers v. Chicago, R.I. & P. R.R.*, 382 U.S. 423, 428 (1966) (same).

7. In *Hagans v. Lavine*, 415 U.S. 528 (1974), this Court held that it is a preferred practice for a single district judge,

(Continued on following page)

II.

Mandamus is the Exclusive Remedy Available to the Petitioners

The requested writ of mandamus should issue because, as this Court has consistently recognized, the petitioners "have no other adequate means to attain the relief [they] desire[ ]." *Allied Chemical*, 449 U.S. at

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Footnote continued—

when presented with both claims that must be heard by a three-judge court and claims that need not be, to resolve the latter before convening the three-judge court. *Id.* at 543-44; *see also Philbrook v. Glodgett*, 421 U.S. 707, 712 n.8 (1975). *Hagans* further holds, however, that "if a single judge rejects the [single-judge] claim, a three-judge court must be called to consider the [three-judge claim]." 415 U.S. at 544. If the three-judge court then disposes of the claim adversely to the plaintiff, a final judgment encompassing all claims must be entered and the plaintiffs may take a direct appeal to this Court.

The practice outlined in *Hagans* was not followed in this case. The trial judge simply disposed of all claims, including the section 203(c) claim which must be heard by a three-judge court. Moreover, the practice of reaching potentially dispositive single-judge claims first, which is generally meant to assure that a three-judge court is not convened unnecessarily, would have been inappropriate in the circumstances of this case because the claims under sections 4(f)(4) and 203 are substantively identical. The early disposition of the one-judge claim adverse to the petitioners would create the unseemly possibility that the required three-judge court would render an inconsistent verdict on the substantively identical claim that is subject to its consideration. The single judge's decision could not, in fact, preclude the three-judge court from reaching a different result because his decision would, at most, establish the law of the case. *See Arizona v. California*, 460 U.S. 605, 619 (1983). Even if a single judge's decision of the section 4(f)(4) claim were regarded as preclusive of an inconsistent, subsequent three-judge disposition of the section 203 claim, only a three-judge court appropriately could make that determination. In that event, the single judge's early decision would foreclose a three-judge court decision on the precise issue that Congress has said must be decided by a three-judge court, without eliminating the need to convene a three-judge court and the right of direct appeal to this Court.

35; *Kerr*, 426 U.S. at 403. This Court has held that, where a district court erroneously fails to convene a three-judge court and denies the claim on the merits, the only remedy is a writ of mandamus from this Court directing the district judge to convene the required three-judge court. *See Ex parte Northern Pacific Railway Co.*, 280 U.S. 142 (1929) (granting petition for writ of mandamus without issuing formal writ); *see also Ex parte Bransford*, 310 U.S. 354 (1940); *Ex parte Atlantic Coast Railroad Co.*, 279 U.S. 822 (1929).[8] No appeal lies to this Court because the decision is not a judgment of a three-judge district court, and no appeal is available in the court of appeals because such an appeal would defeat the purpose of the statute giving a right to direct appellate review in the Supreme Court. *Stratton v. St. Louis Southwestern Railway Co.*, 282 U.S. 10, 16 (1930) (interpreting the three-judge court and direct Supreme Court appeal requirement of 28 U.S.C.A. §§ 1253, 2281 & 2284). As Chief Justice Hughes explained in *Stratton*:

> If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interloc-

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8. A single district judge may dismiss an action where it is apparent from the face of the complaint that the claim of federal jurisdiction, and thereby the right to three-judge adjudication, is patently frivolous. *See Ex parte Poresky*, 290 U.S. 30, 32 (1933); *see also Washington v. Confederated Tribes*, 447 U.S. 134, 146 (1980); *Goosby v. Osser*, 409 U.S. 512, 518 (1973); *Schneider v. Rusk*, 372 U.S. 224 (1963); *Bailey v. Patterson*, 369 U.S. 31 (1962). An appeal from such a decision lies only to the court of appeals. *See Schneider*, 372 U.S. at 225; *Bell v. Waterfront Comm'n of New York Harbor*, 279 F.2d 853 (2d Cir. 1960).

The single district judge below did not base his denial of petitioners' application for a three-judge court on a determination that the claim under section 203 was frivolous. Moreover, the substantiality of the federal claim raised by the petitioners under section 203 has never been in dispute.

> utory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, *for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this court.*

282 U.S. at 15-16 (emphasis added); *see also German v. South Carolina State Ports Authority*, 295 F.2d 491 (4th Cir. 1961) (discussing *Stratton* in dicta).

This Court has thus recognized that the court of appeals lacks jurisdiction to take any action other than to advise the district court of its error. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) (remanding to district court); *Stratton*, 282 U.S. at 18.

Notwithstanding these decisions, there exists uncertainty regarding the appropriate remedy where a single district judge disposes of the merits of a claim that must be heard by a court of three judges. This Court's opinion in *Idlewild* is frequently discussed as creating doubt as to the continued validity of the *Stratton* principles. *Idlewild* has been cited for the proposition that courts of appeals in fact have jurisdiction to review single-judge decisions denying on the merits claims that must be heard

by three-judge courts.[9] Close analysis of *Idlewild* and subsequent decisions of this Court interpreting *Idlewild*, however, shows that "[t]hese decisions establish no more than that appeal does not lie to the Supreme Court." 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*: *Jurisdiction 2d* § 4040, at 140 n.15 (2d ed. 1988). This Court has never held that appellate review on the merits, as was provided by the Eleventh Circuit in this case, in fact is available in the court of appeals if the claim at issue was required to be heard by a three-judge court. Indeed, this Court's decisions expressly hold to the contrary.

The plaintiff in *Idlewild* brought an action in the Southern District of New York and requested a three-judge court pursuant to 28 U.S.C.A. § 2281 (repealed 1976) and 28 U.S.C.A. § 2284 (West 1978 & Supp. 1988). The district judge denied the request and retained jurisdiction of the case, but abstained from deciding it to

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9. *See, e.g., Stamler v. Willis*, 371 F.2d 413, 414-15 (7th Cir. 1966) (remanding with directions to grant request for three-judge court); *Lion Mfg. Corp. v. Kennedy*, 330 F.2d 833, 840-41 & n.14 (D.C. Cir. 1964) (finding that "[t]he availability in the Court of Appeals of direct review of [dismissal of complaint] by a single judge has, after some period of uncertainty, now been solidly established" by *Idlewild*); *Ammex Warehouse Co. v. Department of Alcoholic Beverage Control*, 224 F. Supp. 546, 556 (S.D. Cal. 1963) (reading *Idlewild* decision as advising the district court "that in substance, its judgment was reversed" by the court of appeals), *aff'd*, 378 U.S. 124 (1964); *see also Calloway v. Briggs*, 443 F.2d 296 (6th Cir. 1971) (concluding that district court had erred in refusing to convene a three-judge court and dismissing the action on the merits, appellate court vacated decision of the district court and remanded case for invocation of a three-judge court); *cf. Aaron v. Cooper*, 261 F.2d 97 (8th Cir. 1958); *see generally*, 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*: *Jurisdiction 2d* § 4040, at 145 n.26 (2d ed. 1988) (noting that "modern cases establish that the court of appeals has power to direct that a three-judge court be convened").

give the state courts an opportunity to pass on the constitutional issues presented. The plaintiff appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit dismissed the appeal, holding that "it was powerless to take formal corrective action" in light of *Stratton*, although it unambiguously stated in its opinion that " 'a three-judge district court should have been convened.' " 370 U.S. at 714 (quoting opinion of Second Circuit, 289 F.2d 426 (2d Cir. 1961), *remanded*, 370 U.S. 713 (1962)). The plaintiff then renewed in the district court its request for a three-judge court, relying on the Second Circuit's opinion. The district court once again declined to convene a three-judge court, however, on the ground that the previous ruling of the district court had established the law of the case and that the opinion of the court of appeals that a three-judge court should have been appointed was "merely a 'dictum.' " *Id.* at 715 (quoting opinion of district court).

The *Idlewild* plaintiff then sought review by this Court, filing both a petition for writ of certiorari to the court of appeals and a petition for writ of mandamus to the district court. This Court opined that the Second Circuit had correctly decided that a three-judge court should have been convened and went on to say that the opinion of the Second Circuit "should have been followed" by the district court, notwithstanding that the Second Circuit lacked jurisdiction to review the merits of the appeal. *Id.* at 716.

The Court in *Idlewild* did not hold that the Second Circuit had jurisdiction over the merits of the appeal, or that the district court was required by the Second Circuit's opinion to convene a three-judge court. Rather, it held only that, where the Second Circuit had expressed

an opinion regarding the three-judge court issue, the district court should follow that opinion, even though it appeared only in the context of an order declining to exercise jurisdiction. The Court explained:

> In the Stratton Case it was held that a court of appeals was precluded from reviewing on the merits a case which should have originally been determined by a court of three judges. Stratton does not stand for the broad proposition that a court of appeals is powerless ever to give any guidance when a single judge has erroneously invaded the province of a three-judge court.

Id. at 715-16.

Notwithstanding that *Idlewild* left the *Stratton* rule intact, a number of subsequent decisions of this Court have stated, in dicta, that appeals from orders that refuse to convene a three-judge court can be taken to the courts of appeals. However, none of those decisions expressly overrules the plain holding of *Stratton* that the courts of appeals have no jurisdiction over the merits of such appeals. Each such decision can be read as holding only that, because no three-judge court was convened, an *appeal* to the Supreme Court does not lie. Dicta in this Court's decisions regarding the availability of appellate review in the court of appeals must be interpreted as meaning only that appellate review of the merits *may* lie in the court of appeals, but that the availability of such an appellate remedy is dependent upon the propriety of the district judge's refusal to convene a three-judge court.

For example, in *McLucas v. De Champlain*, 421 U.S. 21 (1975), the Court stated: "[W]e have held that, when

a single district judge fails to call for the convention of a three-judge court and goes on to dispose of the case, an appeal lies only to the court of appeals." *Id.* at 30 (citing *Idlewild*). To follow *Stratton* and *Idlewild*, a court of appeals receiving such an appeal and concluding that a three-judge court should have been convened would have the power to express an opinion regarding the impropriety of the district court's ruling on the three-judge court issue.[10] It would not, however, have jurisdiction to reverse the decision below or to direct any further proceedings. On the other hand, if the court of appeals, either correctly or incorrectly, upheld the district judge's three-judge court denial, it would be required to dispose of the merits of the appeal. If this Court then held that the court of appeals improperly exercised jurisdiction over the appeal, it would be apparent that no appellate remedy was available in the court of appeals.

In *Hicks v. Pleasure House, Inc.*, 404 U.S. 1 (1971), a case relied on by the Court in *McLucas*, the Court went so far as to opine, again in dicta, that "if a single judge oversteps his limited authority under §2284(3), a court of appeals may correct his error." 404 U.S. at 3. But the case does not hold that the court of appeals in fact had jurisdiction to review the decision of the single judge declining to convene the three-judge court. The only corrective action which would be permissible was the corrective action taken by the jurisdictionless Second Circuit in *Idlewild*—dismissal of the appeal for want of

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10. A court always has power, and indeed is required, to assess whether it has jurisdiction over an appeal. *See generally* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3522, at 70-72 (2d ed. 1984).

jurisdiction and expression of an opinion regarding the action below.[11]

Decisions such as *McLucas* and *Hicks* have led commentators to conclude that this Court has retreated from *Stratton* and that an appeal of a single judge's refusal to convene a three-judge court and his or her disposition of the merits lies only to the courts of appeals.[12] That conclusion is not, however, necessitated by this Court's opinions; neither should it be embraced by this Court. The teaching of Chief Justice Hughes in *Stratton*, a decision that has been cited and relied upon by this Court as recently as 1986, *see Bender v. Williamsport Area School District*, 475 U.S. 534, 106 S.Ct. 1326, 1331 n.4 (1986), remains as true today as when written: "[T]o

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11. *See also Mengelkoch v. Industrial Welfare Comm'n*, 393 U.S. 83 (1968) (per curiam) (stating in dicta that an appeal lies to the appropriate court of appeals when a three-judge court dissolves itself for want of jurisdiction); *Wilson v. City of Port Lavaca*, 391 U.S. 352, 352 (1968) (per curiam) (stating in dicta that "when a single judge declines to convene a three-judge court and denies relief[,] an appeal lies to the appropriate United States Court of Appeals"); *Schackman v. Arnebergh*, 387 U.S. 427 (1967) (per curiam) (citing *Idlewild* in dicta for the proposition that review of a district court's refusal to convene a three-judge court is available in the court of appeals); *accord Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100 n.19 (1974) (stating in dicta that interlocutory review of single judge's refusal to convene three-judge court lies in the court of appeals either through a petition for writ of mandamus or through a certified interlocutory appeal).

12. *See* 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶ 421.03[7] (2d ed. 1980); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 91 & n.91 (6th ed. 1986) (citing American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 54, 331-34 (1969)); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4040, at 144 n.25 (2d ed. 1988); Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 Harv. L. Rev. 299, 304-06 (1963).

sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this court." *Stratton*, 282 U.S. at 16. Congress has decided that three-judge courts must hear certain claims and that this Court must review those decisions on direct appeal.[13] Any procedure that would undermine that scheme unconstitutionally invades the province of Congress.

Turning to the instant case, it is apparent that the decision of the single district judge, denying the request for a three-judge court and denying relief on the merits, as well as the Eleventh Circuit's affirmance of those decisions, directly contravene the holdings of *Stratton*, *Idlewild* and the cases cited above which adhere to those decisions. "The single-judge District Court was . . . powerless to dismiss the action on the merits, and should have convened a three-judge court." *Schneider*, 372 U.S. at 225. The single district judge's refusal to convene a three-judge court should have precluded the court of appeals from affirming the district court's decision. The court of appeals had no jurisdiction over the appeal and, therefore, was without power to do anything other than that which the Second Circuit did in *Idlewild*: offer guidance regarding the propriety of the decision to refuse to convene a three-judge district court. Mandamus is, then, as this Court has consistently recognized, the only remedy available to the petitioners.

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13. The issuance of the requested writ of mandamus would, then, "be in aid of the Court's appellate jurisdiction." Sup. Ct. R. 26.

III.

Exceptional Circumstances Warrant the Exercise of this Court's Discretionary Powers

Through the litigation underlying this petition for writ of mandamus, the petitioners have sought a determination of whether the language minority provisions of the Voting Rights Act apply to petitions to amend state constitutions. Many states now authorize their citizens to initiate public votes on amendments to their constitutions by gathering signatures on petitions. In recent years, this method of self-government has become increasingly popular and has led to public votes on numerous state constitutional amendments dealing with a wide array of topics.[14] The "Official English Amendment" at issue in this case has been, and continues to be, the subject of petition drives in many states.[15]

The question of whether petitions to amend state constitutions are subject to the language minority provisions of the Act is one of critical importance to language minorities not only in Florida, but across the country. A decision on the issue by this Court could safeguard such

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14. *See, e.g., In California, They're Voting on Nearly Everything,* BusinessWeek, Oct. 31, 1988, at 30 (reporting that 29 initiatives had been placed on the California ballot and that more than $100 million would be spent promoting or fighting the initiatives); *Just Say 'No' - Or 'Yes',* Newsweek, Nov. 7, 1988, at 63 (reporting on the more than 200 referenda and initiatives on the November, 1988 ballot in 41 states); *Review and Preview,* Barron's, Nov. 7, 1988, at 5, col. 3 (reporting that "on ballots across the country are a host of constitutional amendments, referendums and initiatives concerning everything from car insurance to the rights of privacy of AIDS victims to abortion to closing nuclear power plants") (emphasis omitted).

15. *See* Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens,* 97 Yale L.J. 1418, 1418 (1988); Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States,* 100 Harv. L. Rev. 1345, 1345-47 (1987).

minorities from direct attacks such as that launched by supporters of Official English[16] and from more subtle efforts to diminish their rights through the use of the petition process.[17] It also could ensure that this country's growing language minority population can fully participate in a newly vital process through which fundamental political change is effected.

Congress has determined that the critical question—raised under section 203 of the Act—must be answered in the first instance by a three-judge district court, and that a direct appeal of the three-judge court's decision lies to this Court. By that mandate, Congress has sought to ensure that claims under section 203 receive swift and certain review by this Court. Congress's mandate has, however, been undermined in the instant case by the refusal of the single district judge to convene a three-judge court and his denial on the merits of the petitioners' claims. The action of the single district judge below served not only to prevent the adjudication of the section 203 claim by the required three-judge court, but also, to block this Court's direct review of the merits of a question of great importance. Mandamus is the only remedy available to the petitioners to vindicate their clear legal right to adjudication of their claim by a three-judge court and their right to review of the merits of their claim by this Court.

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16. One commentator has observed: "By its own account, the 'official English' movement seeks to stimulate debate on the sensitive issue of language and to promote social unity through a common tongue. In fact, however, the movement makes language the rallying point for simmering intolerance, frustration, fear, and distrust." Note, *supra* note 15, at 1362.

17. *See* Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 Yale L.J. 569, 574 (1987) (pointing out that the right to petition is effectively denied, and therefore oppressive, to those who have limited financial means).

CONCLUSION

This Court should issue the writ of mandamus, vacating the judgments below and remanding the case to the district court with directions to convene a three-judge court to decide all of the petitioners' claims.[18]

Respectfully submitted,

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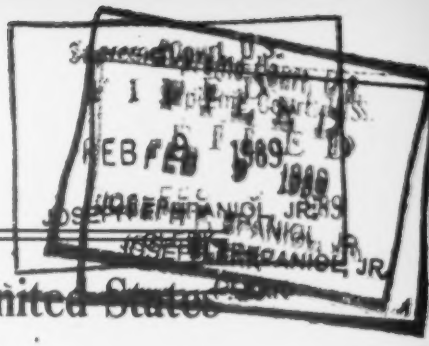
18. Because the district judge lacked jurisdiction to dispose of all of the claims in the case, his disposition of the section 4(f)(4) claim was merely an interlocutory order which was not properly appealable to the court of appeals under 28 U.S.C.A. § 1291 (West 1966 & Supp. 1988). Therefore, this Court should vacate not only the court of appeals' affirmance of the district court's dismissal of the section 203(c) claim, but also its affirmance of the dismissal of the section 4(f)(4) claim, irrespective of whether that claim may, in the circumstances of this case, be heard by a single judge.

88-1329

No.



In the Supreme Court of the United States

OCTOBER TERM, 1988

In Re

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES and MARTA R. TORRES,

Petitioners.

APPENDIX TO PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, AND THE HONORABLE JAMES KEHOE, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

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(November 4, 1988)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-6068

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES and MARTA R. TORRES,
Plaintiffs-Appellants,

versus

JIM SMITH, in his official capacity as Secretary of State of the State of Florida, and DAVID LEAHY, in his official capacity as the Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all County Supervisors of Elections in the State of Florida,
Defendants-Appellees,

and

FLORIDA ENGLISH CAMPAIGN, U.S. ENGLISH LEGISLATIVE TASK FORCE, INC., and U.S. ENGLISH FOUNDATION, INC.,
Intervenors-Appellees.

Expedited Appeal from the United States District Court for the Southern District of Florida

(November 4, 1988)

Before FAY AND ANDERSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

FAY, Circuit Judge:

This is an expedited appeal from a federal district court judgment dismissing a complaint which sought to enjoin certain State of Florida officials from conducting an election on a citizen initiative to amend the state constitution planned for November 8, 1988. The proposed amendment to the Florida Constitution would make English the official language of the State of Florida. As required by Florida law, proponents of the amendment circulated a petition to gather signatures in support of placing the proposed amendment on the ballot. The issue on appeal is whether the circulation of the petition, written only in English, in designated bilingual political subdivisions violated § 203(c) of the Federal Voting Rights Act. The controlling provision of the Voting Rights Act requires a state which distributes "materials or information relating to the electoral process" to certain bilingual political subdivisions to provide them "in the language of the applicable language minority group as well as in the English language." 42 U.S.C. § 1973b(f)(4) (1965). Because we find that the Voting Rights Act does not apply to initiative petitions and the involvement by the state officials in the initiative process does not constitute state action, we affirm the district court's denial of the injunction.

I. BACKGROUND

On October 11, 1988, the plaintiffs/appellants, four registered voters whose primary language is Spanish, filed a complaint in federal district court seeking declaratory and injunctive relief under the Voting Rights Act of 1965, 42 U.S.C.A. §§ 1971-1974(e) (West 1981 & Supp. 1988) ("Act"). The appellants sought to restrain the

Secretary of State of Florida and the Supervisors of Elections of Florida from conducting a vote on a proposed constitutional amendment in an election planned for November 8, 1988.[1] The proposed amendment to the Florida Constitution (the "Official English Initiative") provides:

> (a) English is the official language of the state of Florida.
>
> (b) The Legislature shall have the power to enforce this section by appropriate legislation.

The Florida Constitution sets forth several methods for amending its provisions, including voter initiative. Citizens who wish to amend the constitution may initiate a petition and circulate it throughout the state gathering signatures in support of the amendment. If enough signatures are collected with the proper geographic distribution, the amendment will be placed on the general ballot for Florida voters' consideration. Fla. Const. art. XI, §3. In addition to the signature requirements established by the Florida Constitution, various state statutes charge state officials with limited duties in the course of the initiative process.

For example, the Secretary of State must determine that the petition signatures meet the number and geographic distribution requirements, approve the form of the petition and submit it to the Attorney General of Florida specifying that the petition sponsors have fulfilled certain formal requirements. *See* Fla. Stat. §§ 100.371(4) & 15.21 (1987). Upon receiving the petition, the Attorney

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1. The Florida English Campaign, U.S. English Legislative Task Force, Inc., and U.S. English Foundation, Inc. intervened as defendants. These organizations support the proposed constitutional amendment and represent the interests of the 362,555 proponents of it.

General of Florida must petition the Florida Supreme Court for an advisory opinion on whether the amendment addresses only one subject matter, as required by the state constitution, and whether the amendment's form and style meet specified requirements. Fla. Stat. §16.061 (1987). Finally, the Florida Supervisors of Elections are charged with verifying and validating the petition's form and signatures. Fla. Stat. §100.371(3) and (5) (1987). The district court found that the appellees fully complied with the prescribed state process to amend the constitution.

In complying with the prescribed procedure, the Official English Initiative sponsors circulated a petition written only in English to obtain the requisite number of signatures to put the amendment on the ballot. The appellants contend this circulation violated the Voting Rights Act section which provides that whenever a state subject to rules prohibiting discrimination against citizens of language minorities:

> provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language. . . .

42 U.S.C. § 1973aa-1a(c). Florida has six counties identified under the Act as language minority political subdivisions.

The appellants argued before the district court that the amendment was improperly on the ballot because the Act applied to the initiative petitions and required that the sponsors circulate both English and Spanish copies of the petition in the special bilingual areas. The appellants contended that the Act applied to the initiative process

since the state officials' involvement constituted state action under the Act, and the initiative petitions were materials relating to the electoral process within the language of the Act. The district court disagreed, finding the involvement by state officials in the initiative process did not constitute state action. Therefore, it refused to enjoin a vote on the amendment.

On October 26, 1988, plaintiffs filed an expedited appeal contesting the denial of the injunction. The question before this court is whether the district court erred in denying the injunction. A district court ruling on a preliminary injunction is reviewable only for abuse of discretion. *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985). That discretion is guided by four elements which must be established before a preliminary injunction is proper. *Id.* One element the movant must show is probable success on the merits. *Id.* To statisfy this element, the appellants must make a showing that the petitions are within the language "other materials or information relating to the electoral process" and that the role of the state officials here constituted state action. We will deal with these two issues respectively.

II. INITIATIVE PETITIONS ARE NOT MATERIAL COVERED BY THE ACT.

A. *History*

In examining whether or not these initiative petitions come within the Voting Rights Act, we should begin with the language of the statute and the legislative intent behind the words used. Section 1973b(f)(4) states:

> Whenever any State or political subdivision subject to the prohibition [against discrimination against citi-

> zens of language minorities] provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language.[2]

It is clear that Congress intended the Act to be given "the broadest possible scope." *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969). However, an examination of the legislative history demonstrates that in enacting the Act and its amendments, Congress was concerned exclusively with the ability of all citizens to exercise effectively their right to *vote*.

The Voting Rights Act of 1965 was enacted to remedy the systematic exclusion of blacks from the polls by the use of poll taxes, literacy tests, and similar devices:

> Section 4(a) – To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device. . . .

42 U.S.C.S. § 1973(b) (1986). There is no question that the sole purpose of this legislation was to ensure the integrity of the registration and voting process by eradicating barriers which had previously prevented blacks from voting.

The amendments to the Act passed in 1975 extended the Act's coverage to four other minority groups, including

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2. The language of 42 U.S.C. § 1973aa-1a(c) is nearly identical.

Hispanics. For the first time, Congress prohibited English-only elections in jurisdictions where more than five percent of the voting age citizen population was made up of any single language minority group, and the jurisdiction had a low voter registration or turnout in the 1972 presidential election. Title 3 of Section 203 required that any jurisdiction covered by the Act, which provides official registration or election materials, must make the materials available in the language of the particular minority language group as well as in English. The Committee on the Judiciary emphasized that minority language groups were being obstructed from exercising the franchise since they were unable to understand the ballot and other materials provided at the polls. 1975 *U.S. Code Cong. & Admin. News*, 774, 800-804.

Finally, in 1982, Congress amended the Act by, *inter alia*, providing for assistance *at the voting booth* for groups such as the blind and disabled, and others who may be unable to cast their vote without help. Once again, it seems clear that the purpose of Congress was to further expand access to the ballot. Significantly, Congress has never shown any intent, either in the text of its legislation or in the legislative history, to expand coverage of the Act to materials distributed by private citizens. While undertaking such an expansion in the law might be within the power of Congress under the Fifteenth Amendment, it is an inappropriate step for us to take.

B. *Case Law*

The overly broad interpretation of the Act urged by appellants has been rejected by every court squarely to face the issue. In *Zaldivar v. City of Los Angeles*, 590 F.Supp. 852 (C.D. Cal. 1984), *rev'd on other grounds*, 780

F.2d 823 (9th Cir. 1986), the court held that a notice of intention to recall, published in English only by proponents of a recall election, did not violate the Act. In a well-reasoned opinion, the court explained that the petition process was far too removed from the voting booth to fall under the Act:

> [T]he language of the statute indicates that it applies to information relating to the electoral process. . . . Such a position requires a rather distorted view of the electoral process because nothing one would associate with an election occurs at that stage; principally, no voting occurs. . . The Court cannot reasonably conclude that such conduct violates the Act when it is merely the first step in a process which might ultimately lead to the holding of an election to recall an elected official. . . . [L]egislative history indicates Congress was concerned about impediments to a citizen's ability to exercise his right to vote. Spanish speaking citizens cannot be considered to have been deprived of their right to vote by the publication of a notice of intent to recall in English only.

Id. at 855. *See also Gerena-Valentin v. Koch,* 523 F.Supp. 176 (S.D.N.Y. 1981) ("The failure to provide bilingual petitions does not by itself deprive the Hispanic community of their right to vote. . . .").

Most recently, in *Montero v. Meyer,* Nos. 88-2469, 88-2470 (10th Cir. Nov. 1, 1988), the Tenth Circuit faced a situation nearly identical to that before us. In that case the Tenth Circuit reversed a district court's order which had preliminarily enjoined the Secretary of State of Colorado from conducting an election on a proposed amend-

ment to the state constitution. The defendants, members of the Official English Committee, had circulated a petition in English only, to gather enough signatures to have the proposition placed on the ballot for the general election.

In reversing the district court's preliminary injunction, the circuit court rejected two of the plaintiff's contentions concerning the reach of the Act. First, the court held that the circulation of an initiative petition is not a "prerequisite to voting" under 42 U.S.C. § 1973 1(c)(1) since it does not "relate directly to the casting of a ballot" and thus cannot be included within the definition of "voting" under § 1973b(f)(4). Slip op. at 7.[3] Second, the court held that the Act does not apply to the petition process in its own right.

The history of the Act, the stated intention of Congress, and the relevant case law persuade us that the Voting Rights Act could not properly be applied to the case before us.

C. *Attorney General Guidelines*

We reject appellant's contention that the interpretive guidelines issued by the Department of Justice regarding the language minority provisions of the Act require a contrary result. The guidelines state:

> (a) *Types of materials.* It is the obligation of the jurisdiction to decide what materials must be provided in a minority language. A jurisdiction required

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3. The court also noted that "[i]mplicit in . . . the common definitions of the concept of voting is the presence of a choice to be made. . . . Thus, applying the concept of voting to a process which provides no choice defies the commonly accepted usage of the term." *Id.* at 8.

> to provide minority language materials is only required to publish in the language of the applicable language minority group materials distributed to or provided for the use of the electorate generally. Such materials include, for example, ballots, informational materials, and petitions.

28 C.F.R. § 55.19(a) (1987). Appellant cites this section as authority for the proposition that petitions are included in the Act's definition of electoral material. While we agree with appellant that the interpretation of the agency charged with enforcing a particular law is entitled to considerable deference, *Young v. Community Nutrition Inst.*, 476 U.S. 974 (1986); *Veterans Admin. Medical Center v. Federal Labor Relations Auth.*, 675 F.2d 260 (11th Cir. 1982), we are not persuaded to find that initiative petitions are thus properly treated as electoral material.

First, as the court noted in *Montero*, these same guidelines expressly state that they are intended to be suggestive only: "This subpart [§§ 55.14-55.21] sets forth *the views of the Attorney General* with respect to the requirements of section 4(f)(4) . . . concerning the provision of minority language materials . . . ." 28 C.F.R. § 55.14(a) (emphasis added). Second, despite their eagerness to defer to the view of the Attorney General, the appellants fail to note that the guidelines themselves recognize that the primary responsibility for interpreting the provisions of the Act rests with the officials of the covered jurisdictions. Section 55.2(c), 28 C.F.R. states in relevant part:

> The determination of what is required for compliance with section 4(f)(4) and section 203(c) is the

> responsibility of the affected jurisdiction. These guidelines should not be used as a substitute for analysis and decision by the affected jurisdiction.

Section 55.14(c), 28 C.F.R. states in relevant part:

> It is the responsibility of the jurisdiction to determine what actions by it are required for compliance with the requirements of section 4(f)(4) and 203(c) and to carry out the actions.

Thus we find that the appellees' determination that the initiative petition need not be circulated in Spanish under the Act is entitled to at least the same and possibly greater deference than is the suggested interpretation of the Justice Department. Since we find the interpretation of the state officials more consistent with the language and clear intent of the statutes, the guidelines are not persuasive.

D. *First Amendment Considerations*

We note also the serious First Amendment questions which would be raised were we to adopt the interpretation of the minority language provision urged by appellants. The Florida Constitution expressly provides that "[t]he power to propose the revision or amendment of . . . this constitution by initiative is reserved to the people . . . ." Fla. Const. Art. XI, §3. In establishing the mechanism of initiative petition, Florida vested its citizenry with the right and the responsibility to make needed changes in the Constitution. Thus any degree of governmental hindrance upon the freedom of a given group of citizens to pursue the initiative petition process with whomever, and concerning whatever they choose must be viewed with some suspicion.

In *Meyer v. Grant*, 108 S.Ct. 1886 (1988), the Supreme Court ruled that a Colorado statute prohibiting the use of paid circulators to gather signatures on an initiative petition violated the First and Fourteenth Amendments. The Court articulated its free speech concerns in language which is easily applicable to the case before us:

> Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment. . . . The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. . . . This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'

Id. at 1891-92.[4] The characterization by the Supreme Court of initiative petitions as "core political speech" counsels us toward caution when asked to declare that federal law requires the State to impose a bilingual requirement on a petition originated by private citizens pursuant to Florida law.

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4. *See also Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (attempts to regulate solicitation of charitable contributions necessarily infringe upon protected speech); *Buckley v. Valeo*, 424 U.S. 1 (1976) (campaign expenditure limitation held to be an impermissible burden on right to core political expression).

In other cases concerning state statutes which purported to further some state interest by imposing restrictions on private political activity, the Supreme Court has repeatedly stressed the primacy of the rights of free speech and association. In *Williams v. Rhodes*, 393 U.S. 23 (1968), the Court struck down an Ohio statute which required any new political party seeking a position on the ballot in a presidential election to obtain petitions signed by 15% of the qualified electors who voted in the last gubernatorial election. Despite the state's claim that the provision was necessary to promote political compromise and stability, the Court held that "this [state] interest cannot justify the very severe restrictions on voting and associational rights which Ohio has imposed." *Id.* at 32.

More recently, in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Court struck down a Connecticut statute which required voters in any political party primary to be registered members of that party. The Court invoked a long line of First Amendment precedent in holding that the burden this imposed on private political association could not be sustained:

> The nature of the appellees' First Amendment interest is evident. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. As we have said, the freedom to join together in furtherance of common political beliefs

> *necessarily presupposes the freedom to identify the people who constitute the association.*

Id. at 214 (emphasis added) (citations omitted). The Court went on to note that the right of "like-minded citizens in support of common political goals" to organize themselves is particularly important "at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Id.* at 215-16.

We are similarly reluctant to construe a federal statute to mandate the imposition of a substantial burden on the right of political association, particularly where the clear language of the Act does not so require. It is hard to imagine that in passing the Act, Congress could have intended that private citizens seeking to further their own political goals through the initiative petition process be subject to specific language requirements. Rather, the interests of both the First Amendment and the Voting Rights Act can be harmonized by limiting the latter to those activities involved in casting a vote and not to political speech.

III. STATE ACTION IMPLICATIONS

The appellants contend that the district court erred in holding that the state's involvement in the petition process neither constituted state action nor triggered application of the Voting Rights Act, 42 U.S.C. § 1973b(f)(4). More specifically, they challenge the district court's determination that the petitions were formulated by private citizens with only minimal, ministerial regulation by the state. The appellants argue that the regulatory scheme set out in various Florida statutes governing the

initiative process amounts to state action in "formulating" the petitions as provided in the Voting Rights Act. We disagree and hold that the district court properly concluded that the acts performed by state officials in the initiative process were ministerial in nature and did not involve state action.

Once again we stress that the Constitution of the State of Florida, in article XI, section 3, expressly reserves to the people the right to amend the constitution by initiative. That section provides:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such revision or amendment shall embrace but one subject and matter directly connected therewith. . . .

Fla. Const. art. XI, §3. The state cannot impede or diminish this process so long as it reserves the right of initiative to the people. *Meyer v. Grant*, ... U.S. ....., 108 S.Ct. 1886, 1893 (1988). The section further delineates the procedure for processing the initiative which is codified in the Florida Election Code, chapters 97-106 of the Florida Statutes. Fla. Stat. §97.011 (1987). Under these sections, the secretary of state is charged with limited ministerial duties regarding the initiative process. As discussed earlier, the secretary must determine whether the total number and geographic distribution of petitions is proper, approve the format of the petition, and finally submit it to the Attorney General of Florida and certify that the formal petition requirements have been complied with. However, contrary to appellants' position, these duties do not constitute state formulation of the initiative petition.

In *Montero v. Meyer*, Nos. 88-2469, 88-2470 (10th Cir. Nov. 1, 1988) the Tenth Circuit addressed this precise

issue under the Colorado constitutional initiative scheme.[5] The court held that the Voting Rights Act did not apply to an initiative petition which sought to establish English as the official language of Colorado. In discussing whether the state regulation of the initiative process constituted state action, the court said that

> [t]he acts performed by [state] officers are designed primarily to make the initiative process fair and impartial, and do not constitute providing the petitions to the electorate. At most, the acts of the state officers could be regarded as "regulatory," but state regulation is insufficient to convert private action into state action.

Id. at p. 14-15 (footnote and citations omitted). This reasoning apples to the present case. The Florida initiative procedures merely provide the framework for the general public to submit proposed amendments to the constitution for inclusion on the general election ballot. The secretary of state and attorney general act only to assist all citizens in complying with the legal requirements for such petitions primarily as to form. They neither censor nor endorse the content of any initiative petitions. As the district court noted, the Florida Constitution mandates that a petition be placed on the general election ballot once it conforms to certain format requirements and the single-subject rule. Thus, the statutory scheme serves solely to facilitate proposal of amendments through private action rather than through complex state action.

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5. Although we note that the Colorado statutory regulation of the initiative process differs somewhat from that of Florida, we are persuaded by the Tenth Circuit's reasoning in this case involving nearly identical issues of the application of §1973b(f)(4) to proposed constitutional amendments by voter initiative.

As discussed earlier, in *Zaldivar v. City of Los Angeles, supra,* the court held that the Voting Rights Act did not apply to a notice of intention to recall a city councilman initiated pursuant to a private citizen petition. In finding that the Act did not apply to the situation where private citizens were wholly responsible for initiating the action, the court stated that the Act did apply to instances relating to the electoral process. *Id.* at 855. The court reasoned and emphasized that the petition process is distinct from the electoral process since in the former, nothing associated with an election happens; principally, no voting occurs. *Id.* According to the court, the petition procedure merely comprises the first step in a process which might ultimately result in an election. It does not implicate the voting process itself.[6] *Id.* We agree.

The distinction between the petition process and the electoral process is relevant in examining the appropriate standard for state action to be applied in this case. The appellants argue that the Voting Rights Act was enacted to implement the guarantees of the fifteenth amendment and therefore, the relaxed standard delineating state action in that context is applicable. Appellants' reliance on the fifteenth amendment cases is misplaced. Although it is true that the Act's legislative history encompasses concerns to protect "the fundamental principle that the right to vote shall not be denied or abridged . . . on account of race or color," H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 2437, 2439, when a process other than one impli-

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6. *See also, Gerena-Valentin v. Koch,* 523 F. Supp. 176, 177 (S.D.N.Y. 1981) (no violation of the Voting Rights Act since failure to provide bilingual petitions does not by itself deprive the Hispanic community of their right to vote).

cating the constitutional right to vote is challenged, the correct standard regarding state action involves analysis under the fourteenth amendment.

As stated by the Tenth Circuit in *Montero, supra,* "applying the concept of voting to a process which provides no choice [such as the initiative petition process] defies the commonly accepted usage of the term." *Id.* at p. 8. Moreover, the court held "that the 'electoral process' to which the minority language provisions of the Act apply does not commence . . . until the Secretary of State certifies the measure is qualified for placement upon the ballot, and that signing of an initiated petition is not 'voting.'" *Id.* Thus, since the initiative process in the present case is not "voting," state action is present only if: 1) the governmental and private actors share a "symbiotic relationship," *Rendell-Baker v. Kohn,* 457 U.S. 830, 842 (1982) such that the state is recognized as a joint participant in the challenged activity, *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 725 (1961); 2) the government has delegated a traditional state power to the private party, *Jackson v. Metropolitan Eidson Co.,* 419 U.S. 345, 352 (1974); or 3) the government and the private party share a close nexus such that the private party's actions are deemed those of the state. *Id.* at 351. Florida's regulatory scheme meets none of these standards.

No state action link exists between the proponents of the English language petition and the state statutory scheme. The state does not initiate the petition, does not draft the language of the petition, does not address the merits of the proposal and does not participate in any way in the circulation of the petition or in the

collection of signatures.[7] Rather, all of this action is taken by private citizens. The state's responsibility is to ensure that the petition meets the requirements of law and will fairly present the proposition that may or may not be placed before the electorate. Such regulation is not sufficient to transpose such private conduct into state action. It is only after a petition is successfully subscribed to that it becomes a matter to be put to a vote—a part of the electoral process.

As the district court noted, "the petitions represent the exercise by individuals of their fundamental rights to express themselves freely and to petition the government for redress of grievances, which are protected against governmental intrusion by the First Amendment to the United States Constitution." The United States Supreme Court recognized that circulation of a petition involves activity protected as core political speech. *Meyer*, *supra*, at 1892. Consequently, the right of the people of Florida to propose this constitutional amendment by initiative implicates crucial first amendment protections. State regulation that attempts to make certain that the views of hundreds of thousands of its citizens can be fairly voted upon by the electorate does not equate with

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7. In contrast to Florida's initiative petition scheme, the State of Massachusetts itself prints and *provides* initiative petitions to its electorate. The state also pays for the cost of printing the petitions. *See* Mass. Const., Articles of Amendment, Amend. Art. 48, § 3. Pursuant to the Voting Rights Act, Massachusetts prints its petitions in both English and the language of the applicable language minority group. However, we note an important distinction between states which pay for and print their own petitions, and those, like Florida, which leave these actions wholly to the private citizen proponents of the petition. In the latter situation, the purely private acts do not trigger state action.

state action. The state's sole concern is a fair presentation on the *ballot* in accordance with state law.

These concerns, along with the lack of state action in the purely ministerial statutory scheme governing initiative petitions, mandate this court to uphold the district court's denial of the Appellant's petition for injunctive relief. AFFIRMED.[8]

ANDERSON, Circuit Judge, dissenting:

Respectfully, I dissent. I am persuaded that the initiative petitions at issue are "materials or information relating to the electoral process" within the meaning of section 4(f)(4) of the Voting Rights Act, 42 U.S.C. §1973b (f)(4), and that the state of Florida has "provided" those materials within the meaning of the statute.

I.

Section 4(f)(4) of the Voting Rights Act provides in relevant part:

> Whenever any state or political subdivision [subject to the bilingual electoral requirements] . . . provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language.

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8. Because this is an accelerated appeal involving the elections scheduled for November 8, 1988, the court heard oral argument in Miami, Florida, on November 3, 1988. Both the majority and dissenting opinions have been rushed. Although we feel we have been fully advised as to the issues and are comfortable that we have examined all the authorities, we note that both opinions are not polished products.

42 U.S.C. §1973b(f)(4).[1] The non-governmental appellees' argument that §4(f)(4) applies only to voter registration and actual elections is inconsistent with the plain meaning of the statute and is contrary to Congressional intent.

The statute refers not only to registration forms and ballots, but also to "other materials or information relating to the electoral process." Appellees' position would strip the quoted statutory language of any meaning. It seems clear to me that the petitions at issue easily fall within the phrase "materials or information relating to the electoral process." Certainly the language Congress chose—"relating to the electoral process"—is broad enough to encompass an initiative process which, if successful, results in placing a proposed constitutional amendment before the electorate of Florida for approval or rejection.

The Supreme Court's holding in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), requires a conclusion that the instant petitions are "related to the electoral process." The Court held in *Allen* that the petition process to place candidate names on the ballot is a "standard, practice, or procedure with respect to voting" under section 5 of the Voting Rights Act, 42 U.S.C. §1973c. The nomination petition in *Allen* was a stage in the electoral process comparable to the petition process in this case. Moreover, the language of section 4(f)(4), "materials . . . related to the electoral process," is at least as broad as, if not broader than, the "standard, practice, or procedure with respect to voting" language in section 5 which the *Allen* Court applied to nominating petitions.

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1. Practically identical language is found in section 203(c) of the Voting Rights Act, 42 U.S.C. § 1973aa-1a.

This conclusion is also supported by the Justice Department's regulations for implementing §4(f)(4), which provide as follows:

> (a) *Types of materials.* It is the obligation of the jurisdiction to decide what materials must be provided in a minority language. A jurisdiction required to provide minority language materials is only required to publish in the language of the applicable language minority group materials distributed to or provided for the use of the electorate generally. Such materials include, for example, ballots, sample ballots, informational materials, and *petitions*.

28 C.F.R. §55.19(a) (1987) (emphasis added). The Justice Department's inclusion of petitions as an example of materials that must be provided in the language of the applicable language minority group is consistent with its position that "the objective of the Act's provisions is to enable members of applicable language minority groups to participate effectively in the electoral process." 28 C.F.R. §55.2(b) (1987).[2]

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2. The non-governmental appellees argue that the Justice Department guidelines for implementing the Act delegate authority to the affected jurisdictions to determine precisely what steps are necessary to comply with the Act. 28 C.F.R. § 55.2(c) (1987) does state that "[t]he determination of what is required for compliance with section 4(f)(4) and section 203 is the responsibility of the affected jurisdiction. These guidelines should not be used as a substitute for analysis and decision by the affected jurisdiction." *See also* 28 C.F.R. § 55.14(c) (1987) (similar language). The import of this language is that the Justice Department encourages jurisdictions to fashion bilingual election procedures with the needs of their locale in mind. It does not provide a license to evade the mandate of the language minority provisions of the Voting Rights Act. Nor does it undermine the regulation's definition of the Act's minimum requirements—i.e., "to publish in the language of the . . . minority group materials distributed to . . . the electorate generally . . . for example . . . petitions."

Of course, courts owe considerable deference to the Attorney General's construction of the Voting Rights Act. *United States v. Sheffield Board of Commissioners,* 435 U.S. 110, 131-32 (1978). Deference is especially appropriate here, because the Attorney General's interpretation mirrors the language of the statute itself and Congress has implicitly endorsed the Attorney General's inclusion of petitions as relating to the electoral process. *Pleasant Grove v. United States,* 479 U.S. 462, 468, 107 S.Ct. 794, 798 (1987); *see Extension of the Voting Rights Act: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary on the Extension of the Voting Rights Act,* 97th Cong., 1st Sess. 2323-30 (1981).

Furthermore, the Supreme Court has stated that the Voting Rights Act is to be broadly construed. *Allen v. State Board of Elections,* 393 U.S. 544 (1969), stated that

> We must reject a narrow construction that appellees would give to § 5. . . . [T]he Act gives a broad interpretation to the right to vote, recognizing that voting includes "all action necessary to make a vote effective."

393 U.S. at 565-66, quoting 42 U.S.C. §1973*l*(c)(1) (1964 ed., Supp. I). A broad construction of the already broad language of the language minority provision—"other materials or information related to the electoral process" —must necessarily encompass the instant petitions.

II.

The "state action" prong of our inquiry is a somewhat closer question. The language minority provisions of the Voting Rights Act apply to electoral materials which the state "provides." 42 U.S.C. §1973b(f)(4).

Before an initiative can be considered for the ballot in Florida, its sponsors must follow a detailed procedure prescribed by state law. The Florida Election Code, Fla. Stat.Ann. ch. 97-106, requires that the group sponsoring the proposed constitutional amendment must register with the Florida Department of State, Division of Elections, as a political committee before it begins collecting any signatures. Fla.Stat.Ann. §§100.371(3), 106.03. The sponsor must submit the text of the proposed amendment, and the form of the petition to be circulated, to the Florida Secretary of State for approval. State approval of this form is required before the sponsor may obtain any signatures. Fla.Stat.Ann. §100.371(3). The Florida Secretary of State has promulgated detailed regulations specifying the form that constitutional amendment initiative petitions must take. Among other things, the petition form must be printed on separate cards or sheets of paper and must fall within certain size requirements; the form must contain space for the signee's name and address; there must be space for only one signature per petition form; the petition form must conspicuously contain the full text of the proposed amendment preceded by the title and substance; and, if the text continues on the other side of the form, the same must be clearly indicated. Dept. of State Reg. 1C-7.009. In addition, a proposed constitutional amendment may relate to only one topic.[3]

The purpose and effect of these very specific and detailed state regulations of the form of initiative petitions

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3. Before the voters of Florida are allowed to pass on the initiative, the Secretary of State must submit the text of the proposed amendment to the Attorney General of Florida, who in turn must seek an advisory opinion from the Supreme Court of Florida on the question whether the proposal complies with the state's "single-subject" requirement for all enactments. Fla. Stat.Ann §§15.21, 16.061.

are obviously to ensure that the presentation of the proposed amendment to each elector be in a manner that is easily understood. In my judgment, it is significant that the language minority provisions of the Voting Rights Act have the same purpose—to aid in the clear presentation of electoral materials to those members of the electorate who are not fluent in English. In other words, the state has affirmatively acted in several ways to safeguard elector understanding, but has failed to act in one way specifically required by the Voting Rights Act.

There is additional and significant state involvement in that state law prohibits *any* private action circulating initiative petitions until state officials approve the form of the petitions. Fla.Stat.Ann. §100.361(3).[4] Thus, the instant petitions, in English only, were submitted to the Florida Department of Elections pursuant to state law, and the state officials *approved* the petitions in their English-only form. I conclude that this state approval, together

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4. After state approval of the petition form and after the signatures have been obtained, the Election Code and accompanying regulations then require the sponsors to submit the signed petitions to the Supervisor of Elections for each jurisdiction, who must verify the number of valid signatures that have been obtained. Fla.Stat.Ann. §100.371(4); Dept. of State Reg. 1C-7.0091 (1988). The Supervisors transmit forms that certify the number of valid signatures to the Division of Elections, which compiles the forms and determines whether the constitutional formula has been met. If the requirements have been fulfilled, the Secretary of State issues a certificate of ballot position for the proposed amendment. Fla.Stat.Ann. §100.371(4).

Appellees' argument that the state action is merely ministerial, *see also Montero v. Meyer*, Nos. 88-2469 & 88-2470 (10th Cir. Nov. 1, 1988), would have more force if one considered only the state action described in this footnote, i.e., counting and validating the signatures. However, the state action described and discussed in the text is of a different order. The state regulation of the format is obviously designed to insure understanding of the proposed amendment, and, significantly, the actual format to be used must be *approved* by the state.

with the extensive state regulation of the form of the petitions—regulation of a nature directly analogous to the language minority provisions—is sufficient state involvement to trigger application of the Voting Rights Act. Therefore, I conclude that the state has "provided" the electoral materials within the meaning of the Act.[5]

As noted above, the Justice Department regulations include "petitions" in the definition of "materials relating to the electoral process." 28 C.F.R. §55.19(a) (1987). Because petitions are almost always generated by private political activity, such as the initiative at issue here, the

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5. I agree with appellees that their determination of the substance of the proposed amendment and their circulation of the petitions themselves is wholly private political activity. Such private activity is to be distinguished from the state activity in regulating and approving the form to ensure easy understanding.

The non-governmental appellees raise the specter of a violation of their First Amendment right to petition the government for redress of grievances, citing *Meyer v. Grant*, ... U.S. ....., 108 S.Ct. 1886 (1988). *Meyer* held invalid a Colorado provision making it a felony to pay petition circulators. Unlike the state provision which *Meyer* held unconstitutional, the instant federal regulation imposes no burden at all on the petition process. The minority language translation required by the Voting Rights Act imposes no conceivable hindrance to circulating the petitions or collecting signatures, and could not conceivably reduce the number of signatures which the sponsors could likely obtain. *Meyer*, ... U.S. at ....., 108 S.Ct. at 1892. The Voting Rights Act, as well as other federal regulation of the electoral process, has repeatedly withstood constitutional challenges to its validity. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *Buckley v. Valeo*, 424 U.S. 1, 143-44 (1976).

Clearly, the substance of the speech to be communicated is not affected by the Spanish translation of the proposal. As the Court noted in *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), "States have enacted comprehensive and sometimes complex election codes. . . . [T]he State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." The bilingual requirement is a reasonable regulation to promote elector understanding, precisely like the other regulations adopted by Florida governing the form of initiative petitions.

regulation indicates that there is usually sufficient state involvement to trigger application of the Act.

Finally, my conclusion that the state action prong is satisfied by Florida's involvement in the initiative process is supported by the requirement under Supreme Court precedent that the language of the statute be given a broad interpretation. *Allen v. State Board of Elections*, 393 U.S. 544 (1969).[6]

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6. Because the state here has explicitly approved the petition form in English-only, I would conclude that the state action analysis of the Fourteenth Amendment has been satisfied. This case does involve extensive state regulation of the form in which petitions are to be presented to the electorate, regulation of the same character as the bilingual language provision. That by itself may be sufficient to satisfy the Fourteenth Amendment state action analysis, *see, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). However, I need not reach that issue for two reasons. First, and most important, a finding of state action in this case does not depend upon treating private action (by virtue of extensive state regulation) as the equivalent of state action. Rather, in this case, the state itself has acted; the state has affirmatively approved the English-only petition form.

Second, I suggest that the district court erred in relying only on Fourteenth Amendment cases. As stated in the text, the issue whether the state "provides" the petitions at issue here is a matter of statutory construction, and the Voting Rights Act is to be read broadly in order to effectuate its goals of an informed electorate and a fair political process. And in any event, I suggest that cases construing the Fifteenth Amendment provide the more appropriate precedent. Congress enacted the Voting Rights Act pursuant to the enforcement provision of the Fifteenth Amendment. *South Carolina v. Katzenbach*, 383 U.S. 301, 327-28 (1966). The Supreme Court has indicated that a broad range of electoral activity, even purely private action, may constitute state action for Fifteenth Amendment purposes. *See, e.g., Terry v. Adams*, 345 U.S. 461 (1953) (actions of "self-governing voluntary club" held state action under the Fifteenth Amendment); *Id.* at 473 (opinion of Frankfurter, J.) ("The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are

(Continued on following page)

III.

Very few courts have confronted the question before us today. Appellees point to *Gerena-Valentin v. Koch*, 523 F.Supp. 176 (S.D.N.Y. 1981) as standing for the proposition that the language minority provisions of the Act do not apply to petitions. In *Gerena-Valentin*, a candidate for the New York City Council alleged that the city violated section 4(e) of the Act (which prohibits states and localities from conditioning the right to vote on the ability to read and understand English) by failing to provide bilingual aid in the ballot petition process. In rejecting the candidate's claim, the court stated that "there was no showing that the defendants failed to adequately provide bilingual assistance in the ballot petition process." 523 F.Supp. at 177. Although the court did say that "the failure to provide bilingual petitions does not by itself deprive the Hispanic community of their right to vote, particularly where as here the plaintiffs have not made any effort on their own to provide the bilingual aid they now request," 523 F.Supp. at 177, I note that the court was considering §4(e) of the Act, and not §4(f), which contains the language minority provisions. Moreover, *Gerena-Valentin* does not provide any factual detail; for example, it does not appear that New York played any part in establishing the form or contents of the petitions in that case. In sharp con-

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Footnote continued—

colored."); *Smith v. Allwright*, 321 U.S. 649, 660 (1944) (primaries and other events essential to the electoral process subject to Fifteenth Amendment: "the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State.").

trast, Florida plays an extensive role in regulating the form of the initiative petitions at issue here. In any event, the sparse analysis provided by the *Gerena-Valentin* court leaves the opinion with little precedential weight.

The district court in *Zaldivar v. City of Los Angeles,* 590 F.Supp. 852 (D.C. Cal. 1984), held that the recall petition process was not part of the electoral process. However, the precedential value of that case was undermined on appeal. In reversing the district court's award of Rule 11 sanctions, the Ninth circuit, in dicta, indicated that the petition process probably was part of the electoral process under the Act. *Zaldivar v. City of Los Angeles,* 780 F.2d 823 (9th Cir. 1986).

Most recently, the Tenth Circuit concluded that the Voting Rights Act did not cover Colorado initiative petitions very similar to those at issue today. In *Montero v. Meyer,* Nos. 88-2469 & 88-2470, slip op. (10th Cir. Nov. 1, 1988), the Tenth Circuit concluded that Colorado initiative petitions were not materials relating to the electoral process, because "the 'electoral process' to which the minority language provisions of the Act apply does not commence under Colorado law until the Secretary of State certifies the measure is qualified for placement upon the ballot." *Montero,* slip op. at 8. In light of the plain meaning of the Act itself, the Attorney General's interpretation of the statute, and the Supreme Court's decision in *Allen*—all discussed in part I above —I find the analysis of the Tenth Circuit unpersuasive.

The Tenth Circuit also concluded that the petitions were not "provided" by the state, and thus that the "state action" prong of the Act was not satisfied. The court

assumed that the state action was merely "ministerial" and stated only that "[a]t most, the acts of the state officers could be regarded as 'regulatory,' but state regulation is insufficient to convert private action into state action." *Montero*, slip op. at 14-15. Because the Tenth Circuit's analysis of the "state action" prong was merely conclusory, I respectfully suggest that it should be accorded little precedential weight.

IV.

Because I believe that the initiative petitions at issue constitute "materials relating to the electoral process" that are "provided" by the state of Florida within the meaning of the language minority provisions of the Voting Rights Act, I must respectfully dissent.

(Filed October 18, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO: 88-1880-CIV-KEHOE

PEDRO DELGADO, et al.,
Plaintiffs,

v.

JIM SMITH, et al.,
Defendants.

ORDER DENYING APPLICATION FOR THREE-JUDGE PANEL

THIS CAUSE is before the Court upon the application of the Plaintiffs for a hearing of this cause by a three-judge panel.

After a review of the motion, it is

ORDERED AND ADJUDGED that the application is DENIED. The convening of three-judge courts is strictly construed.[1] The wording of the particular subsection[2] of the Voting Rights Act here in issue does not require a three-judge court in this instance. Furthermore, although the sole case[3] relied upon by the movants places emphasis on the special circumstances addressed by the Act, nonetheless, the actual holding in that case is confined to an interpretation of a different section of the Act.

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1. *Allen v. State Board of Elections*, 393 U.S. 544, 561, 89 S.Ct. 817, 829, 22 L.Ed.3d 1 (1969).

2. 42 U.S.C. §1973aa-2.

3. *Allen v. State Board of Elections*, supra at footnote 1.

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of October, 1988.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

copies furnished to:

see attached service list

SERVICE LIST

Case No: 88-1880-CIV-KEHOE

Robert A. Butterworth, Esq., Attorney General, State of FL

Donald M. Middlebrooks, Esq.

George Waas, Esq.

Mark A. Dienstag, Esq.

Steven A. Zalesin, Esq

Murray Greenberg, Esq., County Attorney

(Filed October 18, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO: 88-1880-CIV-KEHOE

PEDRO DELGADO, et al.,
Plaintiffs,

v.

JIM SMITH, et al.,
Defendants.

ORDER GRANTING LEAVE TO INTERVENE

THIS CAUSE is before the Court upon the motion of the Florida English Campaign (a Florida political committee), the U.S. English Legislative Task Force, Inc. (a District of Columbia non-profit corporation) and the U.S. English Foundation, Inc. (a District of Columbia non-profit corporation) to be joined or to intervene as non-governmental defendants in this action.

After a review of the motion, it is

ORDERED AND ADJUDGED that the motion to intervene is GRANTED. See Fed.R.Civ.P. 24(a)(2).

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of October, 1988.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

copies furnished to:

see attached service list

SERVICE LIST

Case No: 88-1880-CIV-KEHOE

Robert A. Butterworth, Esq., Attorney General, State of FL

Donald M. Middlebrooks, Esq.

George Waas, Esq.

Mark A. Dienstag, Esq.

Steven A. Zalesin, Esq.

Murray Greenberg, Esq., County Attorney

(Filed October 24, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO: 88-1880-CIV-KEHOE

PEDRO DELGADO, et al.,
Plaintiffs,

v.

JIM SMITH, et al.,
Defendants.

FINAL MEMORANDUM DECISION

THIS CAUSE is before the Court upon an emergency motion seeking preliminary injunctive relief[1] to restrain the Defendants, the Secretary of State of Florida and the Supervisors of Elections of the State of Florida ("the State"), from allowing any votes to be cast or counted with respect to a citizen initiative to amend the Florida Constitution (the "Official English Initiative") that is to be voted on at the general election on November 8, 1988. The Plaintiffs, four registered voters whose primary language is Spanish, seek injunctive and declaratory relief on the basis that the Official English Initiative was improperly placed on the November 8th ballot pursuant to petitions which, in certain counties of the state, were in violation of the language minority

1. At the expedited hearing in this matter, the parties agreed that the request for preliminary injunctive relief would be considered a prayer for final injunctive relief. Argument of counsel and presentation of evidence were predicated on that basis.

provisions[2] of the Voting Rights Act of 1965 ("the Act"). Also party to this action as Defendant Intervenors are the Florida English Campaign, the U.S. English Task Force, Inc. and the U.S. English Foundation, Inc., organizations supporting proposed constitutional amendment and representing the interests of the 362,555 proponents of the Official English Initiative.

In 1975, the Act was amended in order to protect language minorities. Pursuant to section 203(c) of the Act,[3] criteria were established for language minority political subdivisions. Six such counties[4] have been so identified in the State of Florida. Section 203(c) also provides:

> Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language. . .

At the expedited hearing held in this matter, the parties acknowledged that there are no disputed facts at issue and that the sole determination for the Court is whether the circulation of the initiative petition in the designated language minority political subdivisions only in the English language violated section 203(e) of the Act, as set forth above.

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2. 42 U.S.C. §§1971 to 1974(e).

3. 42 U.S.C. 1973aa-1a(b).

4. Collier, Dade, Hardee, Hendry, Hillsborough and Monroe counties.

The Plaintiffs argue that because the Official English Initiative petitions were circulated in the designated language minority political subdivisions of Florida only in the English language, to the extent the petitions from such subdivisions contributed to placing the initiative on the election ballot, that contribution must be declared invalid. This, in turn, would mandate invalidation of the entire initiative, on account of an insufficient number and geographic distribution of the remaining valid petitions.

The parties do not dispute the fact that both the initiative proponents and the applicable state officers followed the initiative process set forth under Florida law. Accordingly, in the absence of contested issues of fact, and as supported by the pleadings and their attached exhibits, the Court makes a finding of fact that the Defendants and Intervenors acted in accordance with the prescribed state process to amend the Florida Constitution by the initiative process.

The Court further concludes, as a matter of law, that the State's involvement in the petition process does not amount to state action triggering application of the Voting Rights Act. The Supreme Court of the United States has held that state action is present where the governmental and private actors enjoy a "symbiotic relationship," *Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S.Ct. 2764, 2772, 73 L.Ed.2d 418 (1982), such that the state can be deemed a joint participant in the activity in question, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S.Ct. 856, 862, 6 L.Ed.2d 45 (1961); where the government has delegated to a private party a traditional state power, *Jackson v. Metropolitan Edison*

Co., 419 U.S. 345, 352, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 (1974); or where the government and the private party have a nexus sufficiently close that the latter's action can be deemed that of the state. *Jackson*, 419 U.S. at 351, 95 S.Ct. at 453. *See generally Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987). None of these circumstances are present here.

While a petition initiative in Florida is subject to state approval, such approval *must* be granted, so long as certain format requirements have been adhered to and the proposed amendment forming the basis of the petition embraces no more than one subject matter.

Pursuant to the initiative provision[5] of the Florida Constitution:

> The power to propose the revision or amendment of any portion or portions of this of this constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

The Secretary of State is charged under various state statutes with limited ministerial duties in connection with the initiative process. These duties consist of determining

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5. Art. XI, §3, Fla. Const.

that the total number and geographic distribution of petitions is proper, approving the form of the petition,[6] and submitting the petition to the Attorney General of Florida specifying that the petition proponents have fulfilled certain formal petition requirements.[7] The Attorney General of Florida is charged under state statute, upon receiving the proposed constitutional amendment, with petitioning the Supreme Court of Florida for an advisory opinion as to whether the proposed amendment embraces only one subject matter, as mandated by the Florida Constitution, and whether its presentation on the election ballot will conform to specified requirements as to form and style.[8] Also, the Florida Supervisors of Elections are charged with the duty of verifying and validating the petition's form and supporting signatures.[9]

After careful consideration, the Court concludes the foregoing regulatory scheme does not establish that the State of Florida "has so far insinuated itself into a position of interdependence with [private citizens] that it must be recognized as a joint participant in the challenged activity." *Burton,* 365 U.S. at 725, 81 S.Ct. at 862. Nor does it demonstrate "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson,* 419 U.S. at 351, 95 S.Ct. at 453. Finally, the petitioning by citizens to amend their state constitution does not represent a traditional state

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6. §100.371(4), Fla. Stat.

7. §15.21, Fla. Stat.

8. §16.061, Fla. Stat.

9. §100.371(3) and (5), Fla. Stat.

power which has been delegated by the state to those private parties. To the contrary, such petitions represent the exercise by individuals of their fundamental rights to express themselves freely and to petition the government for redress of grievances, which are protected against governmental intrusion by the First Amendment to the United States Constitution. *Meyer v. Grant*, ... U.S. ....., 108 S.Ct. 1886 (1988) ("[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at ....., 108 S.Ct. at 1892.). *See also* Smith, *"Shall Make No Law Abridging. . .": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 Cinc. L. Rev. 1153 (1986). Indeed, the Constitution of the State of Florida has expressly reserved to the people the power to initiate petitions to amend it. Fla. Con. Art. XI, §3.[10]

Furthermore, the Act expressly limits it applicability to those election materials which have been provided by the State. 242 U.S.C. §1973b(f)(4). *See also* 28 CFR §55.19 (requiring the relevant state or political subdivision to publish in the language of the applicable language minority group only those election materials which the jurisdiction has "*distributed to or provided for* the use of the electorate geneally." (emphasis added)). Thus, even were the Court to assume, without deciding the issue, that petitions do amount to election materials, a citizen-initiated petition in Florida is not within the Act's contemplation because the petition has not been provided by the State. While a petition initiated by the *State* might would

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10. *See also* Fla. Admin. Code, Rule 1C - 7.009(6), deeming petitions to be "political advertisements."

fall into that category,[11] a petition such as the one here, which is initiated, formulated, distributed and circulated by private citizens, with only minimal, ministerial regulation by the state, clearly does not. Accordingly, state action warranting application of the Act's language minority provisions is not present.

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the injunctive relief sought by the Plaintiffs is hereby DISMISSED.[12]

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

copies furnished to:

Murray Greenberg, Esq., Donald M. Middlebrooks, Esq., George Waas, Esq., Mark Dienstag, Esq.

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11. At the hearing, counsel for the Intervenor pointed out that both Arizona and Massachusetts provides for the initiation of petitions by the state. The Court concludes that the reference in the Code of Federal Regulations to petitions as an example of election materials subject to the requirements of the Act denotes such state-initiated petitions, and/or ones which, although initiated by private citizens, nevertheless are subject to comprehensive state regulation to an extent beyond that which exists in the case at bar. 28 C.F.R. §55.19(a).

12. The Court stresses that this decision in no way represents a judgment as to the merits of the constitutional amendment at issue. Rather, the present ruling is limited to the narrow question of whether the petition to place the proposed amendment on the election ballot is subject to the language minority requirements of the Voting Rights Act.

(Filed October 24, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO: 88-1880-CIV-KEHOE

PEDRO DELGADO, et al.,
Plaintiffs,

v.

JIM SMITH, et al.,
Defendants.

FINAL JUDGMENT DENYING DECLARATORY AND INJUNCTIVE RELIEF

PURSUANT to this Court's Final Memorandum Decision of this date, denying the Plaintiffs' petition for declaratory and injunctive relief, it is

ORDERED AND ADJUDGED that a Final Judgment denying the Complaint for Declaratory and Injunctive Relief is hereupon entered in favor of the Defendants.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of October, 1988.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

copies furnished to:

Murray Greenberg, Esq., Donald Middlebrooks, Esq., George Waas, Esq., Mark Dienstag, Esq.

(Entered November 4, 1988)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-6068

D.C. Docket No. 88-1880

PEDRO DELGADO, MARCELO LLANES GREGORIO and MARTA R. TORRES,
Plaintiffs-Appellants,

versus

JIM SMITH, In his official capacity as Secretary of State of Florida and

DAVID LEAHY, in his official capacity as Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all county supervisors of Elections in the State of Florida,
Defendants-Appellees,

FLORIDA ENGLISH CAMPAIGN, U.S. ENGLISH LEGISLATIVE TASK FORCE Inc., and U.S. ENGLISH FOUNDATION, INC.,
Intervenors.

Appeal from the United States District Court for the Southern District of Florida

Before FAY and ANDERSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

*Honorable Clarence W. Allgood, Senior U. S. District Judge for the Northern District of Alabama, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

ANDERSON, Circuit Judge, dissented and filed an opinion.

Entered: November 4, 1988
For the Court: Miguel J. Cortez, Clerk
By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: December 29, 1988

(Filed December 19, 1988)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-6068

PEDRO DELGADO, MARCELO LLANES, GREGORIO and MARTA R. TORRES,
Plaintiffs-Appellants,

versus

JIM SMITH, et al.,
Defendants-Appellees,
FLORIDA ENGLISH CAMPAIGN, et al.,
Intervenors.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion November 4, 1988, 11 Cir., 1988, ... F.2d .....).
(December 19, 1988)

Before FAY and ANDERSON, Circuit Judges, and ALLGOOD,* Senior District Judge.

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active

*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
United States Circuit Judge

(Filed October 17, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO. 88-1880-CIV-KEHOE

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES, and MARTA R. TORRES,
Plaintiffs,

v.

JIM SMITH, in his official capacity as Secretary of State of the State of Florida, and DAVID LEAHY, in his official capacity as the Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all county Supervisors of Elections in the State of Florida,
Defendants.

PLAINTIFFS' APPLICATION FOR THREE-JUDGE COURT

Plaintiffs Pedro Delgado, Elia Gregorio, Marcelo Llanes and Marta R. Torres, pursuant to section 2284 of the Judicial Code, 28 U.S.C.A. § 2284 (West 1978 and 1988 Supp.), hereby make application for hearing of this cause by a three-judge district court, and request that the Chief Judge of the United States Court of Appeals for the Eleventh Circuit be immediately notified of this application and of plaintiffs' Emergency Motion for a Preliminary Injunction, in order that the necessary designation of judges for said court may be made. The grounds for this application are set forth in the Memorandum of Law submitted herewith.

Respectfully submitted,

Steel Hector & Davis
4000 Southeast Financial Center
Miami, Florida 33131-2398
Telephone (305) 577-2904

By: /s/ Donald M. Middlebrooks
Donald M. Middlebrooks
Steven J. Uhlfelder
Samuel J. Dubbin

-and-

Weil, Gotshal & Manges
Suite 2100
701 Brickell Avenue
Miami, Florida 33131
Telephone (305) 577-3100

By: /s/ Steven A. Zalesin
Steven A. Zalesin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Application for Three-Judge Court was served by overnight mail this 17th day of October, 1988, upon:

Murray Greenberg, Esquire
County Attorney
Metro Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993

The Hon. Robert A. Butterworth
Attorney General
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32399-1050

and

Phyllis Slater, Esquire
Division of Elections
Legal Division
1801 The Capitol
Tallahassee, Florida 32399-0250

/s/ Donald M. Middlebrooks
Donald M. Middlebrooks

(Filed October 17, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO. 88-1880-CIV-KEHOE

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES, and MARTA R. TORRES,
Plaintiffs,

v.

JIM SMITH, in his official capacity as Secretary of State of the State of Florida, and DAVID LEAHY, in his official capacity as the Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all county Supervisors of Elections in the State of Florida,
Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR THREE-JUDGE COURT

Plaintiffs Pedro Delgado, Elia Gregorio, Marcelo Llanes and Marta R. Torres respectfully submit this Memorandum of Law in support of their application for hearing of this cause by a three-judge district court.

Introduction

This is an action to enforce the language minority requirements of the Voting Rights Act of 1965, 42 U.S.C.A. §§ 1971-1974(e) (West 1981 and 1988 Supp.) ("Voting Rights Act" or "Act"). Plaintiffs have raised claims

for relief that, under the express provisions of the Act, can be adjudicated only by a three-judge district court.

Discussion

Plaintiffs have alleged in their complaint that defendant Jim Smith, as Secretary of State of Florida, violated, *inter alia*, section 203(c) of the Voting Rights Act, 42 U.S.C.A. § 1973aa-1a, by approving for use throughout Florida an initiative petition that was printed in English only, and by certifying the initiative for the ballot based on such non-bilingual petitions. Section 204 of the Act, 42 U.S.C.A. § 1973aa-2, which provides for judicial relief from violations of section 203(c), states:

> An action under this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall be to the Supreme Court.

42 U.S.C.A. § 1973aa-2.

Section 2284 of Title 28 of the United States Code provides in pertinent part that:

> (a) A district court of three judges shall be convened when otherwise required by Act of Congress . . . .
>
> (b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:
>
> (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the

> circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

28 U.S.C.A. § 2284.

Under the authority of these statutes, a three-judge district court must be convened to hear plaintiffs' Voting Rights Act claims against the defendant state officials. *See also Allen v. State Board of Elections*, 393 U.S. 544, 561-63 (1969) (in view of "extraordinary effect the [Voting Rights] Act might have a federal-state relationships and the orderly operation of state government," Congress intended that claims under the Act be determined by a district court of three judges).

Conclusion

The Court should grant plaintiffs' application for hearing by a three-judge court, and should immediately notify the Chief Judge of the United States Court of Appeals for the Eleventh Circuit, so that the necessary designation of judges can be made.

Respectfully submitted,

Steel Hector & Davis
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Telephone (305) 577-2904

By: /s/ Donald M. Middlebrooks
Donald M. Middlebrooks
Steven J. Uhlfelder
Samuel J. Dubbin

-and-

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701 Brickell Avenue
Miami, Florida 33131
Telephone (305) 577-3100

By: /s/ Steven A. Zalesin
Steven A. Zalesin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law in Support of Plaintiffs' Application for Three-Judge Court was served by overnight mail this 17th day of October, 1988, upon:

Murray Greenberg, Esquire
County Attorney
Metro Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993

The Hon. Robert A. Butterworth
Attorney General
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32399-1050

and

Phyllis Slater, Esquire
Division of Elections
Legal Division
1801 The Capitol
Tallahassee, Florida 32399-0250

/s/ Donald M. Middlebrooks
Donald M. Middlebrooks

Supreme Court, U.S.
FILED
MAR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1329

IN THE SUPREME COURT OF THE UNITED STATES

October Term. 1988

In Re Pedro Delgado, Elia Gregorio, Marcelo Llanes and Marta R. Torres, Petitioners

Brief For Non-governmental Respondents In Opposition To Petition For Writ of Mandamus

Mark Dienstag
BRENNER & DIENSTAG
21 Southeast First Avenue
9th Floor
Miami, Florida 33131
(305) 372-8899
Counsel of Record
Counsel for Non-governmental Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Being dissatisfied with the questions posed by petitioners, non-governmental respondents suggest to the Court that the question presented in this petition is:

Where a three-judge panel is not required by statute or case law to hear claims brought by individuals under sections 4(f)4 and 203 of the Voting Rights Act, did both the Courts of Appeals for the Eleventh Circuit and the District Court err in fully adjudicating and denying petitioners' claims of violations of those sections without invoking a three-judge panel?

LIST OF AFFILIATED CORPORATIONS

Pursuant to Rule 28.1, non-governmental respondents hereby state that other than the non-profit corporations listed below, there are no corporations affiliated with non-governmental respondents:

U.S.ENGLISH Foundation, Inc.

U.S.ENGLISH Legislative Task Force, Inc.

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JURISDICTION

The judgment of the court of appeals was entered on November 4, 1988. The court of appeals denied rehearing on December 19, 1988. The petition for writ of certiorari and the petition for writ of mandamus were filed on February 9, 1989. The jurisdiction of this Court to grant a writ of mandamus was invoked under 28 U.S.C. §1651(a).

Respondents note that the trial of this matter indicated a serious question of whether petitioners have standing to bring this action. Although petitioners claimed that they were harmed by not having sufficient advance notice of the circulation of the English-language petitions which were the subject of this proceedings, Petitioners' Petition for Writ of Certiorari, No. 88-1327, at 6, trial testimony demonstrated conclusively that petitioners and many others had notice of the petition and its contents many months before the initiative was qualified for the ballot. *See, e.g., In re: Advisory Opinion to the Attorney General: English - The Official Language of Florida*, 520 So.2d 11 (Fla. 1988)(fifteen organizations filed amicus briefs in opposition to proposed initiative). In fact, petitioners' expert witness testified that his efforts to organize opposition to the initiative were unsuccessful solely due to apparent apathy in the community; this lack of opposition was confirmed when the initiative received 84 percent of the vote in the November 1988 election.

In addition, as discussed *infra*, petitioners failed to raise this issue before the Court of Appeals so the Court could review the District Court's finding that the statutes do not require a three-judge panel for this case.

STATEMENT OF THE CASE

This case involves an initiative to amend the Florida constitution to declare English the state's official language. The initiative was adopted by the voters of Florida by a vote of 84-16%.

This petition asks whether both the Court of Appeals for the Eleventh Circuit and the United States District Court for the Southern District of Florida properly denied petitioners' request for a three-judge court. This request oversteps the facts. Petitioners mentioned this issue in a footnote in their brief to the Court of Appeals, but did not ask that court to rule on the three-judge panel issue. Petition for Writ of Mandamus (hereinafter Pet.) at 7.

Petitioners, who filed this action less than a month before the election and who requested and received expedited consideration of this matter, now claim that the "expedited nature of the appeal" was the reason the Eleventh Circuit never had a chance to rule on this issue. *Id.* In fact, the Eleventh Circuit gave petitioners substantial leeway in bringing and prosecuting their appeal, yet petitioners never raised the three-judge panel issue in a manner so that the Eleventh Circuit could rule on the question. That task was left to the United States Department of Justice, which fully apprised the Eleventh Circuit of its view on this question. *Id.* at 7-8

REASONS FOR DENYING THE WRIT

I. PETITIONERS HAVE FAILED TO MEET THEIR BURDEN UNDER 28 U.S.C. § 1651(a) AND SUPREME COURT RULE 26.

Petitioners contend that the Court should issue a writ of mandamus because exceptional circumstances warranting the exercise of the Court's discretionary powers exist. *See* Pet. at 8. In addition, the petitioners contend that they have no other adequate means to attain the relief they desire and that their right to issuance of the writ is clear and indisputable. *See id.* at 9. An analysis of the applicable law, however, indicates that petitioners' contentions are wholly without merit and that their petition for a writ of mandamus should, therefore, be denied.

The issuance of a writ of mandamus is a drastic and unusual remedy reserved for extraordinary cases. *See, e.g., Will v. United States*, 389 U.S. 90 (1967); *Bankers Life Co. v. Holland*, 346 U.S. 379 *Ex parte Fahey*, 332 U.S. 258 (1947); *Parr v. United States*, 351 U.S. 513 (1956). Moreover, the Court has emphasized that a writ of mandamus should be restricted to the most extraordinary situations in order to avoid piecemeal appellate litigation, particularly in an era of excessively crowded lower court dockets. *See Kerr v. United States Dist. Court*, 426 U.S. 394 (1976). Therefore, unless petitioners can "clearly and indisputably" show that the writ of mandamus will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court, the

Court must abstain from issuing the writ. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (stating that petitioners must establish that their "right to issuance of the writ is clear and indisputable"); *Kerr, supra.*

A. Granting a Writ of Mandamus for a Three-Judge Panel Will Not Aid the Court's Appellate Jurisdiction

In the present case, the petitioners have failed to show how granting a writ of mandamus will be in aid of the Court's appellate jurisdiction. *Marbury v. Madison,* 1 Cranch 137, 175 (1803). In fact, their brief is virtually silent on this issue.[1] However, despite their silence, the record indicates that mandamus will not aid the appellate jurisdiction of the Court because the merits of petitioners' case are already before the Court on a petition for writ of certiorari. *Delgado v. Smith*, No. 88-1327.

Moreover, the issues of petitioners' case, which from the outset have been legal in nature, have already been sufficiently sharpened for the Court by four district court judges and six appellate court judges in four different states. *See Delgado v. Smith*, No. 88-1880-CIV-JWK (S.D. Fla. 1988), *aff'd Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988); *Montero v. Meyer*, 861 F.2d 603, (10th Cir. 1988); *Montero v. Meyer,* 696 F.Supp. 540

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1 The only reference to any procedural error involving three-judge panels allegedly committed by the district court in the proceedings below is found on page 3 footnote 2 of petitioners' brief before the Eleventh Circuit. See Pet. at 7. Petitioners, however, did not raise the issue in their appeal to the Eleventh Circuit, choosing instead to have the circuit court render a decision on the merits.

(D.Colo. 1988); *Zaldivar v. City of Los Angeles,* 590 F.Supp. 852 (C.D. Cal. 1984), *rev'd on other grounds*, 780 F.2d 823 (9th Cir. 1986); *Gerena-Valentin v. Koch*, 523 F.Supp. 176 (S.D.N.Y. 1981).

Furthermore, the deliberations of the courts below indicate that the petitioners have fully and fairly litigated the merits of their case. *See id.* The petition does not argue that petitioners failed to receive full and fair review from the courts below. To the contrary, petitioners received all of the the review they asked for, despite the fact that "[t]he overly broad interpretation of the Act urged by the [petitioners] has been rejected by every court squarely to face the issue." *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), reprinted in petitioners' Appendix to Petition for Writ of Mandamus (hereinafter Pet. App.) at A7.

B. There are No Present Exceptional Circumstances Warranting the Exercise of the Court's Discretionary Powers

The Court should abstain from granting a writ of mandamus because there are no exceptional circumstances in this case which warrant the exercise of the Court's discretionary powers.[2] Specifically, the Voting Rights Act ("Act") gives private citizens no right to adjudication by a three-judge district court in claims brought under sections 203 and 4(f)(4) of the Act.[3] *See* 42 U.S.C. §1973b(f)(4); 42 U.S.C. §1973 aa-1a(c); 42 U.S.C. §1973 aa-2.

Assuming *arguendo*, that Congress intended to permit private enforcement of the Act's bilingual provisions, it certainly does not follow that Congress also intended that these private enforcement actions be heard by three-judge district courts. On the contrary, the strong disfavor of three-judge panels supports the opposite position. *See* Burger, The State of the Federal

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2 Especially when petitioners did not ask the Eleventh Circuit to examine Judge Kehoe's finding that the statutes do not require a three-judge panel in this case. Pet. App. at A31, 47; Pet. at 7.

3 The language of both sections 203 and 4(f)(4) is substantively identical. Pet. at 2. Section 204 of the Act provides the Attorney General with the right to adjudication by a three-judge court under section 203, but, despite numerous amendments to this section, Congress has refused to extend that right to private citizens.

The Voting Rights Act contains no express private right of action. Nevertheless, lower courts, following *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), have extended an implied private right of action from Section 5 of the Act to the bilingual provisions in sections 203 and 4(f)(4). *See, e.g., Montero, supra*; *Zaldivar, supra*; *Genera-Valentin, supra.*

Judiciary, 58 A.B.A.J., 92 S.Ct. 2921, 1053 (1972) ("[t]he original reasons for establishing these special courts, whatever their validity, no longer exist."). In fact, "[t]he only recommendation upon which there has been unanimous accord among the Study Group, the Hruska Commission, the Court, and the commentators is the elimination of most of the exceptions to the Court's discretionary jurisdiction, and in particular to the provisions for three-judge district courts and direct appeals therefrom to the Supreme Court." R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 47 (5th ed. 1978). Not surprisingly, the petitioners have failed to produce a single case which holds that private actions brought under sections 203 and 4(f)(4) must be heard by three-judge district courts.

However, even if the Court found that there was such a right under Section 203, there is every indication that the district court proceeded properly in this case under Section 4(f)(4). *See* Amicus Brief for the United States in the court below (partially reprinted in Petition for a Writ of Certiorari in *Montero v. Meyer*, No. 88-6376, at 41a [hereinafter *Montero* Petition]).

C. The Petitioners Have Failed to Show That Adequate Alternative Relief Cannot be Had

Petitioners' appellate brief before the circuit court requested that the Eleventh Circuit should accept jurisdiction over the appeal and reverse the district court's disposition of the merits. *See* Pet. at 7. In other words, the argument petitioners advance here – that the court of appeals was without jurisdiction to affirm the district court's disposition of the merits because the district court failed to convene a three-judge court – is totally

inconsistent with their previous invocation of jurisdiction at the circuit court. In fact, the petitioners conspicuously failed to raise this jurisdictional issue to the court below; raising it at this level is an attempt to get another bite at the apple.[4] *See McLucas v. De Champion*, 421 U.S. 21, 30 (1975) ("[W]e have held that, when a single district judge fails to call for the convention of a three-judge court and goes on to dispose of the case, an appeal lies only to the court of appeals.").

However, even if petitioners had properly raised their jurisdictional argument before the circuit court, the argument would have failed. As the United States correctly pointed out in their amicus brief below, there is every indication that the district court proceeded properly in this case under Section 4(f)(4) of the Voting Rights Act which does not require a three-judge court even for actions brought by the Attorney General. *See Montero* Petition at 45a. The position of the United States was that the district court properly proceeded to

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4 Although the petitioners rely on *Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10 (1930), in arguing that mandamus is the only remedy available, this Court has modified *Stratton* by holding that when a single district judge fails to call for the convention of a three-judge court and disposes of the case, appeal lies only to the court of appeals. *See, e.g., McLucas v. De Champlain*, 421 U.S. 21 (1975); *Hicks v. Pleasure House, Inc.*, 404 U.S. 1 (1971). The overwhelming majority of commentators have concluded that decisions such as *McLucas* and *Hicks* indicate that the Court has retreated from *Stratton*. *See, e.g.*, 12 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice 421.03[7] (2d ed. 1980); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1986); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction 2d Sec. 4040 (2d ed.1988); Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv. L. Rev. 299 (1963).

dispose of this case under section 4(f)(4) without having to convene a three-judge panel, and, that having done so, the circuit court had jurisdiction to decide whether the ruling below was in error. *See id.* Thus, petitioners' argument that the court of appeals was without jurisdiction to affirm the district court's disposition of the merits is inconsistent with their position below; more important, their argument is legally deficient and procedurally flawed.

In short, the petitioners have clearly failed to meet their burden for the requested writ of mandamus under 28 U.S.C. §1651(a) and Sup. Ct. R. 26. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (stating that petitioners must establish that their "right to issuance of the writ is clear and indisputable"). Specifically, they have failed to establish that granting a writ of mandamus will be in aid of the Court's appellate jurisdiction; that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers; and that adequate relief cannot be had in any other form or from any other court.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be denied.

Respectfully submitted,

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